

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

In the Matter of)
)
2018 Quadrennial Regulatory Review --) MB Docket No. 18-349
Review of the Commission's Broadcast)
Ownership Rules and Other Rules Adopted)
Pursuant to Section 202 of the)
Telecommunications Act of 1996)

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

*“Competition” – In business, rivalry between entities for customers
or a share of the marketplace.¹*

In the initial comments submitted by those parties opposing reform of the local TV and radio structural ownership rules, the concept of competition – which should be front and center in the FCC’s policy considerations and its economic and legal analyses – is notably absent. Most fundamentally, commenters supporting, or even calling for tightening, the outdated local ownership rules ignore one indisputable fact: that broadcast stations in a highly competitive commercial marketplace upended by digital technologies cannot function in the public interest as Congress intended unless they remain economically viable. In the reply comments below, the National Association of Broadcasters (NAB)² demonstrates the myriad ways that many commenters responding to the Public Notice to update the record in

¹ yourdictionary.com/competition.

² NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

this quadrennial review³ have failed to take account of marketplace competition and ignored the key role competition plays under the statute governing the FCC's ownership reviews. NAB suspects that this yawning gap reflects these parties' belief that diverting attention away from competition is their only hope for the retention of broadcast-only restrictions stemming from the analog era or, indeed, from the World War II era.

Their incentives to downplay competition in this proceeding lead several parties to disregard the plain language of Section 202(h) of the 1996 Telecommunications Act (1996 Act) and even to wildly misinterpret the Supreme Court's decision in *FCC v. Prometheus Radio Project*. While no commenter analyzed the language of Section 202(h), the structure of Section 202 or congressional intent in passing this legislation, several parties citing Section 202(h) blatantly ignored the statute's inclusion of the term "competition" and essentially contended that Section 202(h)'s text did nothing to change the FCC's public interest review of its ownership rules, thereby nullifying Congress's deliberate choice of statutory language. Some commenters even contended that the Supreme Court in *Prometheus* had approved a reading of Section 202(h) giving no prominence to competition and had affirmed the FCC's full discretion to implement its conception of the public interest as to diversity. In fact, the Court did not "affirm" any such thing, as it did not reach any arguments about the interpretation and application of Section 202(h) and expressly left open questions about the FCC's authority under Section 202(h) to consider minority and female ownership in its quadrennial reviews.

NAB has long supported and continues to actively support measures, including but not limited to reinstatement of the tax certificate policy, that may effectively promote new

³ FCC, *Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, Public Notice, MB Docket No. 18-349, DA 21-657 (June 4, 2021) (Public Notice).

entry and diverse ownership by addressing the primary obstacle facing potential female and minority broadcasters: the lack of access to capital. A number of commenters, however, still support retaining structural ownership rules, which do not even address access to capital, in the vain hope that those rules will somehow materially increase ownership diversity in the future, despite having failed to do so for the past 80 years. These parties' "solution" to the problem of low levels of minority and female ownership – mandating an eighth and ninth decade of asymmetric ownership restrictions that discourage investment in a competitively-struggling broadcast industry – is illusory.

But it is the pay TV industry that takes the proverbial competition cake. The American Television Alliance (ATVA) completely ignored the intense competition TV broadcasters now face, while insisting that the Commission should make the local TV rule *more* restrictive, rather than less. Among other harms, tightening the local TV rule would impair stations' ability to leverage economies of scale, which the FCC has agreed enable the provision of high-quality local programming including news, especially in small and mid-sized markets. Evidently the only competition issue that interests ATVA is competitively disadvantaging the local TV stations that MVPDs compete against for viewers and advertisers and with which they negotiate for retransmission consent.

ATVA has shown no basis for its claim that tightening the top-four restriction will somehow constrain the retail prices consumers pay for MVPD service. ATVA has not even demonstrated that MVPDs pay higher retransmission fees for commonly-owned top four stations, or for a station airing the programs of two major networks on multiple streams, as compared to other stations. And the Commission certainly cannot take pay TV providers at their word that they would charge consumers less if only broadcast retransmission fees were lower. That suggestion doesn't even pass the laugh test.

ATVA's proposal to treat multicast streams and low power TV stations as full power stations that count under the top-four restriction also would reduce the quantity, quality and diversity of programming available to audiences. For example, ATVA would have the FCC prohibit a broadcaster from airing a "Big Four" network's programming on its primary channel while also carrying another "Big Four" network's programming on a multicast stream. But in nearly one quarter of all TV markets – those with fewer than four full power commercial TV stations – ATVA's proposal would result in local audiences losing access to valued network programming. In other markets with only four or five full power stations, ATVA would have the FCC force a station carrying a second "Big Four" network's programming on a multicast stream to cease carrying that content, perhaps expecting that network's content to be carried instead on one of the "extra" stations in the market. But what if that "extra" station was airing programming it was contractually obligated to carry, or thought better served its community (e.g., Spanish language or religious), and declined to carry the network programming? Again, the network programming booted off the initial station's multicast stream could easily become unavailable in that market. ATVA cannot possibly justify such intrusion into local markets and broadcasters' programming choices.

Even briefly describing ATVA's proposal shows that its adoption would be contrary to the Communications Act and the Constitution. Section 326 of the Act expressly withholds from the government the power to interfere with the right of free speech by means of radio communication, and the courts have held that the Commission lacks authority to adopt rules significantly implicating program content without Congress's express authorization. FCC rules implementing ATVA's proposal also would violate the First Amendment by regulating the programming content a broadcaster may or may not air on its six megahertz channel. ATVA cannot justify its proposal as "merely" a structural ownership rule regulating the

number of TV licenses a single entity may hold; rather, its proposal would restrict the content that the licensee of even a single TV station may choose to air. In sum, approving ATVA's anti-competitive proposal would embroil the FCC in constitutionally problematic areas where it lacks authority to tread, and for no benefit to the public.

Finally, and unsurprisingly, several commenters opposing any reform of the existing local radio rules merely repeated their calls for no rule changes, without providing evidence about audio or advertising market competition or recent marketplace developments. The FCC should give little weight to comments neglecting to address the questions raised in the Public Notice and, more importantly, failing to undertake any competitive analysis of the radio industry, as Section 202(h) requires. In contrast, ten radio broadcasters provided extensive updated data showing declines in the amount of time Americans spend listening to terrestrial radio, due to competition from streaming, and further documenting the erosion of broadcasters' share of local advertising, due to competition primarily from large digital platforms. NAB now supplements data showing the drop in the radio industry's advertising revenues over time with additional data demonstrating that FM stations have experienced ad revenue declines mirroring the industry as a whole. For these reasons, NAB again urges adoption of its proposal for reforming the local radio rules to provide maximum regulatory relief to AM radio and meaningful relief to FM radio.

Even viewing this quadrennial review through the simple lens of the dictionary definition of competition quoted above, broadcast stations clearly have myriad rivals for customers (*i.e.*, audiences and advertisers) and increasingly struggle for a competitive share of the marketplace. They should not have to compete with these rivals while encumbered by asymmetric rules precluding competition on an even remotely level playing field. NAB again urges the FCC to act without further delay to reform its local radio and TV ownership rules.

II. THE FCC MUST EXPEDITIOUSLY CONCLUDE THE 2018 QUADRENNIAL REVIEW

Now that the Commission has refreshed the record in this proceeding, it should act quickly to conclude the pending quadrennial review. In fact, it already should have completed its 2018 review, as Congress intended in Section 202(h) of the 1996 Act.

Section 202(h) provides that the Commission “shall” review its broadcast ownership rules every four years; “shall” determine whether any of them remain necessary in the public interest as the result of competition; and “shall” repeal or modify any regulation no longer in the public interest. Congress’s repeated use of “the mandatory ‘shall’” creates “an obligation impervious to discretion.”⁴ Under the statute, the Commission lacks any discretion to defer these mandatory duties.

In particular, the Commission has no authority to skip the 2018 review and roll that quadrennial into the upcoming 2022 review, despite the urging of certain commenters.⁵ The Third Circuit Court of Appeals found that approach contrary to the clear terms of Section 202(h) when the FCC previously failed to complete the 2010 review and rolled it into the 2014 review.⁶ Moreover, the “very purpose of § 202(h) – to function as an ongoing mechanism to ensure that the Commission’s regulatory framework would keep pace with the competitive changes in the marketplace – reinforces the need for timeliness.”⁷

The 2014 quadrennial was the last one completed by the Commission, and 2022 is rapidly approaching. During this interim, radio and TV broadcasters’ competition for

⁴ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

⁵ See Comments of C. Terry and C.R. Carlson, MB Docket No. 18-349, at 5 (Aug. 26, 2021).

⁶ *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016).

⁷ *Id.* (internal citation omitted); see also *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1156 (2021) (stating that § 202(h) created iterative process that requires the FCC to keep pace with industry and marketplace developments).

audiences and advertising revenues grew significantly, propelled by continuing technological change. In fact, as NAB explained in detail, marketplace developments in just the past two years, including but not limited to the COVID-19 pandemic and recession, have made reform of the local radio and TV rules more urgent than ever.⁸ NAB accordingly urges the Commission to fulfill congressional intent and its legal obligations under Section 202(h) by concluding its already-belated 2018 quadrennial and updating its local ownership rules “to keep pace with the competitive changes in the marketplace” since 2014.⁹ Neither the nation’s broadcasters nor their local communities are served by further delay.¹⁰

III. SEVERAL PARTIES MISINTERPRET THE SUPREME COURT’S *PROMETHEUS* DECISION OR FAIL TO UNDERSTAND ITS EFFECT, WHILE CONTINUING TO IGNORE THE PLAIN LANGUAGE OF SECTION 202(H)

Multiple parties in this proceeding addressed the Supreme Court’s decision in *Prometheus* and superficially referenced Section 202(h). These commenters, however, appeared to assume that only the Third Circuit Court of Appeals and its precedent are relevant to this proceeding, misstated or misinterpreted the text of Section 202(h) and misread the *Prometheus* case.

From their comments, one wonders whether it escaped the attention of certain parties that the Third Circuit is not currently in control of this quadrennial review. The American Television Alliance (ATVA), for example, flatly asserted that the Third Circuit’s “elaboration” of the public interest standard in Section 202(h) “continues to apply today.”¹¹

⁸ Comments of NAB, MB Docket 18-349, at 64-99 (Sept. 2, 2021) (NAB Supplemental Comments).

⁹ *Prometheus*, 824 F.3d at 50.

¹⁰ If the FCC nonetheless declines to complete the 2018 review, it should initiate the 2022 review as early as possible in the coming year and conclude it within a year.

¹¹ Comments of ATVA, MB Docket No. 18-349, at v, 25 (Sept. 2, 2021) (ATVA Comments).

But in fact, the Third Circuit, following the Supreme Court’s unanimous reversal of its decision, issued an order not only vacating its prior opinion and judgment but also expressly stating that “[t]his Court and panel do not retain jurisdiction.”¹² In the event of litigation over the FCC’s 2018 quadrennial review, the Third Circuit’s interpretation of Section 202(h) is not controlling in any of the other 11 other circuits that could potentially hear a future ownership order appeal, including the D.C. Circuit Court of Appeals, which interprets Section 202(h) rather differently and, in NAB’s view, more consistently with the statutory text, the structure of Section 202 as a whole and Congress’s clear intent.¹³ Contrary to ATVA’s claim, the D.C. Circuit’s “elaboration” of Section 202(h)’s standard is every bit as applicable to this quadrennial review as the Third Circuit’s standard, and neither “requires” the Commission to consider retransmission consent issues as part of its review.¹⁴

¹² *Prometheus Radio Project v. FCC*, Judgment Order, Case Nos. 17-1107, *et al.* (May 7, 2021).

¹³ No circuit court other than the D.C. Circuit and the Third Circuit have ever interpreted or applied § 202(h). For the reasons NAB explained in its Supplemental Comments (at 38-52), we find it likely that other circuit courts would construe § 202(h) in a manner closer to the D.C. Circuit’s reading than to the Third Circuit’s view. See *also id.* at notes 117, 123 and 138 (noting deficiencies in the Third Circuit’s interpretation of § 202(h)).

¹⁴ ATVA Comments at 25. As far as NAB understood its argument, ATVA asserted that, under the Third Circuit’s conception of the “plain public interest” standard in § 202(h), the FCC must consider all issues that fall within its authority to regulate in the public interest, even beyond the “three ‘traditional’ public interest goals of promoting competition, localism, and viewpoint diversity.” *Id.* That position is atextual, as well as nonsensical, and easily could lead to parties contending that the FCC must consider myriad issues arguably implicating broadcasting and the public interest as part of reviewing the structural ownership rules. Indeed, such a broad conception of the public interest unmoored from the text, context and purpose of Section 202(h) might run afoul of the non-delegation doctrine. See *Nat’l Broad. Co. v. U.S.*, 319 U.S. 190, 209-210, 216 (1943) (stating that “the public interest” must “be interpreted by its context” to prevent “an unconstitutional delegation of legislative power”). In any event, as discussed in Section VI., *infra*, the FCC should decline ATVA’s invitation to turn this quadrennial review into yet another retransmission consent proceeding in which the pay TV industry rehashes arguments that previously failed to convince either Congress or the Commission to alter the retransmission consent regime.

In focusing on Third Circuit decisions from 2004, 2011 and 2016 directing the Commission to determine the effects of its ownership rules on minority and female ownership,¹⁵ Free Press also chose not to address the impact of the Supreme Court's reversal of the Third Circuit's 2019 order. In its last *Prometheus* decision, the Third Circuit had directed the FCC to ascertain on record evidence the likely effect of any proposed ownership rule changes on minority/female station ownership,¹⁶ similar to the circuit court's previous directives to the FCC to determine the effect of its rules on minority/female ownership.¹⁷ But the Supreme Court reversed without remand the Third Circuit's fourth and final *Prometheus* opinion, concluding that the FCC's treatment of diversity of broadcast station ownership passed legal muster and scuttling the lower court's directive to the Commission. As a result, the Third Circuit's conclusions in the earlier *Prometheus* cases cited by Free Press that the FCC had not properly considered minority/female ownership issues, and that court's directives to the FCC to address them, now lack any remaining force, particularly given that the panel and the Third Circuit did not retain jurisdiction.¹⁸

¹⁵ Comments of Free Press, MB Docket No. 18-349, at 20-21 (Sept. 2, 2021) (Free Press Comments) (stating that the FCC had refused to act, despite repeated Third Circuit mandates directing the FCC to examine how changes to its ownership limits impacted ownership opportunities for women and people of color).

¹⁶ *Prometheus Radio Project v. FCC*, 939 F.3d 567, 587 (3d Cir. 2019), reversed, 141 S. Ct. 1150 (2021).

¹⁷ *Prometheus Radio Project v. FCC*, 824 F.3d 33, 54 note 13 (3d Cir. 2016); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 (3d Cir. 2011).

¹⁸ It is also now an open question whether the Third Circuit, or any other court, may properly order the FCC to address minority/female ownership in the context of its § 202(h) reviews. The Supreme Court left open the issue of whether § 202(h) requires – or even *authorizes* – the FCC to consider women and minority ownership in its quadrennial reviews. The only Justice to address that question answered it in the negative. *Prometheus*, 141 S. Ct. at 1160, note 3; Concurring opinion of Justice Thomas, *id.* at 1161-63.

Due to their erroneous assumption – or wishful thinking – about the continuing power the Third Circuit and its precedent have over this quadrennial review proceeding, ATVA, United Church of Christ and other commenters did not acknowledge the existence of D.C. Circuit precedent interpreting Section 202(h) and Section 11 of the 1996 Act.¹⁹ When citing Section 202(h) and emphasizing its “public interest” language, these parties also uniformly neglected to mention that Section 202(h) obligates the Commission to “determine whether any” of its broadcast ownership rules “are necessary in the public interest as *the result of competition.*” According to ATVA, for example, Section 202(h) obligates the Commission to “determine whether its broadcast-ownership rules remain in the public interest.”²⁰

¹⁹ Section 202(h) mandates that the FCC review its ownership rules quadrennially “as part of its regulatory reform review under section 11.” See NAB Supplemental Comments at 40-42, 44-45 and notes 114, 121 (discussing § 11).

²⁰ ATVA Comments at 24. For its part, Free Press cited the Third Circuit for the proposition that § 202(h) left the FCC free to reregulate, ignoring the different position taken by the D.C. Circuit and declining to present any reasons why the Third Circuit’s statutory construction is the one more faithful to Congress’s language and intent. Free Press Comments at 21. See *Fox TV Stations, Inc. v. FCC*, 230 F.3d 1027, 1033 (D.C. Cir. 2002) (describing Section 202(h) as designed to “continue the process of deregulation” begun by Congress in the 1996 Act). Another commenter, moreover, argued that the FCC should not adopt NAB’s proposal for reforming the local radio rule because there has not been sufficient time “to permit a reasoned evaluation of the impact” of the recently reinstated 2017 rule changes, even though those changes were not to the local radio rule. Comments of iHeart Communications, Inc., MB Docket No. 18-349, at 6 (Sept. 2, 2021) (iHeart Comments). This contention ignored two D.C. Circuit decisions that expressly rejected such a “wait-and-see approach” as contrary to § 202(h)’s mandate. *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002). See also *Fox*, 280 F.3d at 1043 (stating that the FCC’s “wait-and-see approach cannot be squared with its statutory mandate promptly . . . to ‘repeal or modify’ any” unnecessary rule). And changes to the cross-ownership rules are unlikely to substantially impact the radio industry. For example, the radio/TV cross-ownership rule *allowed* the common ownership of one TV station and *seven* radio stations in the largest radio markets. The rule’s elimination only means that the owner of a TV station in the largest radio markets can now own *eight* radio stations (*i.e.*, the maximum allowed under the local radio rule for large markets).

But it is UCC that doubled-down on the “public interest” language in Section 202(h), essentially denying the key role competition plays in the FCC’s quadrennial reviews while extensively quoting an amicus brief filed in UCC’s support in the *Prometheus* case before the Supreme Court.²¹ As quoted by UCC, this amicus brief noted Section 202(h)’s references to the “public interest,” concluding that this section retained unchanged the “lodestar” guiding the FCC’s regulation of media ownership. Indeed, the brief goes so far as to say that “[n]othing in the text or otherwise suggests that Congress intended to change the Commission’s long understanding of its public interest duty to advance media diversity”²² – nothing, that is, except the actual language of the statute.

Congress’s clear directive in Section 202(h) to “determine” whether the ownership rules “are necessary in the public interest as the result of competition” is on its face not the equivalent of requiring the FCC to “determine” whether its rules are “necessary in the public interest.” Reading Section 202(h) in that manner would ignore “the question that Congress required” the FCC “to answer.”²³ It also would be inconsistent with basic principles of statutory interpretation.

First, construing Section 202(h) as requiring merely a standard “public interest” analysis, rather than a competition-focused one, would be contrary to the plain statutory language, thereby violating the “one, cardinal canon” of construction.²⁴ Second, it would

²¹ Comments of United Church of Christ, OC Inc., et al. (UCC), MB Docket No. 18-349, at 12-13 (Sept. 2, 2021) (UCC Comments).

²² *Id.* at 13 (emphasis added).

²³ *Fox*, 280 F.3d at 1044 (concluding that retaining a national TV ownership rule was contrary to Section 202(h) because FCC did not conduct an adequate competition analysis).

²⁴ *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). According to the Supreme Court, it must be “presume[d] that a legislature says in a statute what it means

create a superfluity problem. Congress “intend[s] each of its terms to have meaning”²⁵; thus, the FCC must give full effect to the phrase “as the result of competition,” so that this provision will not be “inoperative or superfluous, void or insignificant.”²⁶ Third, throughout the provisions of the Communications Act addressing broadcasting, Congress used the phrase “public interest,”²⁷ but in the 1996 Act, Congress in Section 202(h) deliberately changed that familiar, well-established language and said “public interest as the result of competition,” which must mean something different. It is “presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion” of statutory language.²⁸ Congress’s purposeful inclusion of only one traditional public interest factor – competition, not diversity in any form – requires the preeminence of that factor in the FCC’s Section 202(h) analyses.

Fourth, “it is a commonplace of statutory construction that the specific governs the general”;²⁹ thus, “[s]pecific terms prevail over the general in the same or another statute which might otherwise be controlling.”³⁰ “That is particularly true,” according to the Supreme Court, where “Congress has enacted a comprehensive scheme and has deliberately

and means in a statute what it says there.” *Id.*; accord, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002).

²⁵ *Bailey v. U.S.* 516 U.S. 137, 145 (1995).

²⁶ *Corley v. U.S.*, 556 U.S. 303, 314 (2009) (citations omitted).

²⁷ See, e.g., 47 U.S.C. §§ 303, 307(a), 309(a), 310(d).

²⁸ *Barnhart*, 534 U.S. at 452; accord *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

²⁹ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

³⁰ *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957), quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). Accord *Bloate v. U.S.*, 559 U.S. 196, 207 (2010) (quoting *D. Ginsberg* with approval).

targeted specific problems with specific solutions”³¹ – such as with Congress’s adoption of Section 202 to overhaul and reorient towards competition the FCC’s unduly regulatory broadcast ownership regime. Section 202(h)’s specific terms accordingly govern the mandated quadrennial reviews, and Congress’s instructions to the FCC in that section limit the way the Commission can exercise its general authority “[c]onsistent with law.”³²

In sum, simply ignoring the plain statutory phrase “as the result of competition” does not produce a rational, let alone persuasive, reading of Section 202(h). UCC’s insistence that the “text” of Section 202(h) did “nothing” to change anything about the FCC’s public interest review of its ownership rules improperly nullifies an entire statutory provision and disregards congressional intent.³³

³¹ *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citations omitted) (explaining that, when interpreting statutes containing both “general authorizations” and “more limited, specific” ones, the “terms of the specific authorization must be complied with”).

³² 47 U.S.C. § 303(r) (granting power to the FCC, as the “public convenience, interest, or necessity requires,” to “[m]ake such rules and regulations . . . *not inconsistent with law*, as may be necessary to carry out the provisions of this chapter”) (emphasis added). For example, the FCC cannot rely on its general authority to disregard Congress’s directive to determine the necessity for its rules as the result of competition, or its mandate to repeal or modify rules determined to be no longer in the public interest. Courts have overturned agency decisions made pursuant to their general authority under a statute because they bypassed or disregarded more specific statutory provisions in doing so. See, e.g., *Markair, Inc. v. Civil Aeronautics Board*, 744 F.2d 1383, 1385-86 (9th Cir. 1984); *Regular Common Carrier Conf. v. U.S.*, 820 F.2d 1323, 1331 (D.C. Cir. 1987); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997). In another broadcast-related context (retransmission consent), the FCC recognized that its general grants of authority do not authorize it to act in a manner “inconsistent” with other provisions of the 1934 Act and that, under a “fundamental canon of statutory construction,” specific provisions govern more general ones. Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2728 and n. 57 (2011).

³³ UCC also asserted (via its inclusion of lengthy block quotes from the same amicus brief) that the FCC has long found that promoting minority and female ownership of broadcast stations serves the public interest. UCC Comments at 12-13. NAB agrees with the FCC on the importance of diverse station ownership, but UCC’s assertion does not lead to the conclusions it wants to draw about § 202(h). For example, UCC quoted the amicus brief’s

Finally, misreadings of and misstatements about the Supreme Court’s *Prometheus* decision abound. For instance, UCC asserted that the Court “affirmed” the FCC’s discretion to implement the public interest standard in the Communications Act and Section 202(h) and take action to protect ownership diversity as part of that standard.³⁴ Beyond ignoring (again) that Section 202(h) cabined the “public interest” by “the result of competition,” the Court did not affirm any such thing. Indeed, the Court expressly did not reach arguments as to whether Section 202(h) authorizes the FCC to consider minority and female ownership in its quadrennial reviews.³⁵

discussion of a 1995 FCC rulemaking notice, which stated the public interest is served by increasing opportunities for minorities and women. Obviously, this notice said nothing about § 202(h) specifically; nor did it address the FCC’s structural ownership rules (except for proposals to allow minority/female-controlled entities to own *more* stations than otherwise permitted by those rules), but instead focused on initiatives to increase access to capital. See *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Notice of Proposed Rulemaking, 10 FCC Rcd 2788 (1995). UCC (at 13) also cited the FCC’s 2002 biennial review order, which listed the “five types” of diversity pertinent to media ownership policy, including minority/female ownership diversity. But in the portions of that order determining whether to retain, repeal or modify its ownership rules under § 202(h), the FCC did not even mention minority/female ownership. See, e.g., *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, 13760-67 (2003) (analyzing whether newspaper cross-ownership rule promoted viewpoint diversity). In more recent quadrennial reviews, the FCC similarly did not justify or determine to retain, repeal or modify rules on the basis of diversity of ownership but merely stated that certain of its rules were consistent with promoting that goal. See *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864, 9893, 9911, 9944, 9951-52 (2016) (2016 Ownership Order). UCC cited no quadrennial review order in which the FCC justified its retention, repeal or modification of any structural ownership rule so as to promote women or minority ownership. In fact, the FCC has declared that “it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership.” *Memorandum Opinion and Order*, 100 FCC 2d 74, 94 (1985).

³⁴ UCC Comments at 1; see also *id.* at 11.

³⁵ *Prometheus*, 141 S. Ct. at 1160 note 3 (stating that the Court “need not reach” an “alternative argument that the text of Section 202(h) does not authorize (or at least does not require)” consideration of minority/female ownership as part of quadrennial reviews). Also misreading this portion of the opinion, another party asserted that the Court left open the question of whether § 202(h) reviews “*must* incorporate a focus” on minority/female

Similarly, another commenter claimed that the Supreme Court “implicitly reject[ed] the argument that competition should be the predominant criterion” in Section 202(h) reviews, and that the Court “reaffirmed the Commission’s historical methods of analyzing the radio broadcast market in determining whether to retain, modify or repeal the local radio ownership rules.”³⁶ These claims are erroneous. The Court did not reject, implicitly or otherwise, any arguments about the appropriate interpretation of Section 202(h) – it simply did not reach them because the *Prometheus* case could be and was decided on other, narrower grounds. And the Court “reaffirmed” nothing about the FCC’s methods of analyzing the radio marketplace for purposes of Section 202(h) reviews because, again, the Court did not reach any questions about Section 202(h)’s interpretation or application and because the local radio ownership limits were not among the rules at issue in *Prometheus*. NAB urges the Commission to disregard those comments misunderstanding the Supreme Court’s *Prometheus* decision and misinterpreting its effects.

IV. COMMENTERS PROVIDED NO EVIDENCE DEMONSTRATING THAT RETAINING THE EXISTING STRUCTURAL OWNERSHIP RESTRICTIONS WILL PROMOTE MINORITY AND FEMALE OWNERSHIP OF BROADCAST OUTLETS IN THE FUTURE

NAB’s comments showed that Congress, several federal agencies and the Commission have recognized for decades that the primary obstacle facing women and minorities establishing or expanding their businesses – including communications and

ownership. Written *Ex Parte* Communication from Multicultural Media, Telecom & Internet Council (MMTC) to Sanford Williams, FCC, MB Docket No. 18-349, *et al.*, at 7 (Aug. 4, 2021) (MMTC *Ex Parte*) (emphasis added). In fact, the Court left open the question whether the FCC was even *authorized* to consider minority/female ownership in § 202(h) reviews.

³⁶ iHeart Comments at 3, 9.

broadcast businesses – is the lack of access to capital.³⁷ Unsurprisingly, then, the FCC’s maintenance of structural ownership rules for 80 years has not promoted diversity in broadcast ownership because those restrictions do nothing to increase potential minority and female new entrants’ access to capital. A number of commenters, however, still support retention of the existing ownership rules in the vain hope that those rules will somehow increase ownership diversity in the future, despite having failed to do so for over three-quarters of a century. NAB and other commenters, in contrast, support policies that have a track record of promoting new entry and diverse ownership in broadcasting.

A. NAB and Other Commenters Support Measures That May Effectively Promote New Entry and Diverse Ownership

Although not mentioned by certain parties that purport to support policies advancing minority/female ownership of broadcast stations, other commenters called on the Commission to “lead the effort” to persuade Congress to reinstate the 1978-1995 tax certificate policy,³⁸ which is widely recognized as “by far the most effective vehicle for advancing minority broadcast ownership.”³⁹ The FCC’s tax certificate program used the market-based incentive of tax deferment to encourage the owners of broadcast and cable properties to sell them to minorities, and tax certificates also were issued to investors who provided start-up capital to minority-controlled companies.⁴⁰ Tax certificates gave minority

³⁷ NAB Supplemental Comments at 10-19. NAB specifically discussed the FCC’s decades-long understanding that lack of access to capital is the “crucial” or “predominant” barrier to new entry and diverse ownership in broadcasting. *Id.* at 12-14.

³⁸ Comments of Allen Media Group, MB Docket No. 18-349, at 9 (Sept. 2, 2021) (Allen Media Comments).

³⁹ MMTC *Ex Parte* at 6.

⁴⁰ Erwin Krasnow, *The Life and Death of Minority Tax Certificates*, Radio & Television Business Report (Feb. 9, 2017).

entrepreneurs increased access to the market for broadcast and cable properties, provided a bargaining chip to prospective minority broadcasters, helped them attract initial investors and opened previously-closed doors to financial institutions.⁴¹ The FCC adopted the policy in 1978 – based on a rulemaking petition filed by NAB – and before Congress eliminated it in 1995, the issuance of tax certificates had resulted in the acquisition by minorities of 288 radio stations, 43 TV stations and 31 cable systems.⁴²

NAB has supported readoption of a tax certificate policy for many years and has made increasing diversity in broadcasting, including by reinstating this successful policy, a major part of its Broadcasters’ Policy Agency for the 117th Congress.⁴³ NAB worked closely with Representatives G.K. Butterfield and Steven Horsford in the House, and Senators Gary Peters and Robert Menendez in the Senate, for the introduction this summer of bills to reinstate a revised tax certificate, and we continue to help garner and publicize external support for both bills from various stakeholders, including 50 state broadcast associations and nine previous FCC Chairpersons.⁴⁴ Accordingly, NAB strongly agrees with commenters

⁴¹ *Id.*

⁴² *Id.*; Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 983 (1978) (Minority Ownership Policy Statement) (adopting diversity tax certificate policy).

⁴³ <https://www.nab.org/bpa2020/agenda.html>

⁴⁴ NAB News Release, *NAB Statement on Introduction of Broadcast Station Ownership Legislation* (Aug. 5, 2021); Letter of 50 State Broadcasters Associations, Including the District of Columbia and the Commonwealth of Puerto Rico, In Support of the Reinstatement of the Diversity Tax Certificate Program, to Speaker Nancy Pelosi and Leaders Chuck Schumer, Mitch McConnell and Kevin McCarthy (Aug. 12, 2021); Inside Radio, *Former FCC Chairs Lend Their Support To Reviving Tax Certificate Program* (Sept. 8, 2021). NAB also has supported the tax certificate in congressional testimony and written op-eds calling for its reinstatement. See NAB News Release, Testimony of Diane Sutter, President and CEO of ShootingStar Broadcasting, on behalf of NAB, at House of Representatives Communications and Technology Subcommittee Hearing on Media Marketplace Diversity (Jan. 15, 2020); Gordon H. Smith, *Congress should reinstate tax certificate program to foster media ownership diversity*, The Hill (June 23, 2020).

urging the Commission to do everything possible to encourage the 117th Congress to approve tax certificate legislation.

NAB, through its Leadership Foundation, also has established other successful programs for assisting minorities and women to enter the broadcast industry, rise in the ranks of broadcast executives and acquire broadcast stations. Our Broadcast Leadership Training Program (BLT), a 10-month Executive-MBA style program intended to help managerial-level employees, particularly women and minorities, advance in the broadcast industry, celebrated its 20th anniversary last year. Of its 359 graduates to date, over 65 percent have been promoted one or more times and 60 have been or currently are station owners. The Leadership Foundation also maintains two other programs to prepare talented and diverse college students and recent graduates to enter the broadcast industry through training in media sales and broadcast technology.⁴⁵

And finally, given virtually universal agreement, including by nine former FCC Chairpersons, that the “greatest barrier to diversity [in broadcasting] is access to capital,”⁴⁶ NAB supports and urges the Commission and Congress to consider other creative approaches, beyond enacting tax certificate legislation, to increasing new entrants’ ability to

⁴⁵ The Media Sales Academy is a free, seven month program preparing college students and new graduates for internships and entry-level positions at broadcast stations. Participants learn the fundamentals of media sales, with executives of major media companies serving as faculty and recruiters from top companies attending and interviewing participants. The Technology Apprenticeship Program is a paid six month program designed to prepare students and recent graduates in technology fields for a career in broadcast technology. Participants receive educational experience through hands-on training at a radio or TV station and exposure to the latest technology and advances in broadcasting (e.g., ATSC 3.0).

⁴⁶ Inside Radio, *Former FCC Chairs Lend Their Support To Reviving Tax Certificate Program* (Sept. 8, 2021). See NAB Supplemental Comments at 10-15 (showing agreement about the access to capital problem among Congress, various federal agencies, the FCC, broadcast industry analysts and station brokers, and numerous current and former minority and female broadcasters).

access capital. In congressional testimony last year, for example, NAB suggested Congress examine whether modifications could be made to Small Business Administration (SBA) loan guarantees that better reflect the realities and challenges of financing broadcast outlets.⁴⁷ The Commission could help investigate this approach and, if found promising, work with broadcasters and other communications service providers to propose specific improvements in the SBA's loan programs to Congress. NAB also requests the Commission to publicize its incubator program for radio and work to make effective the only program it currently has to enhance new entrants' access to capital.⁴⁸ NAB remains committed to working with the FCC, interested stakeholders and certain commenters in this proceeding to address the primary obstacle to diverse new entry into broadcasting.⁴⁹

⁴⁷ NAB News Release, Testimony of Diane Sutter, President and CEO of ShootingStar Broadcasting, on behalf of NAB, at House of Representatives Communications and Technology Subcommittee Hearing on Media Marketplace Diversity (Jan. 15, 2020).

⁴⁸ See Further Comments of MMTC, MB Docket No. 18-349, at 6 (Aug. 31, 2021) (MMTC Further Comments) (urging FCC to hold an incubator workshop to generate interest in the program). The FCC, however, should decline to address MMTC's repetitive complaint about the definition of "comparable" radio markets in the incubator program. See *id.* at 5; Comments of Nat'l Ass'n of Black Owned Broadcasters, Inc. (NABOB), MB Docket No. 18-349, at note 16 (Sept. 1, 2021) (NABOB Comments). The FCC rejected this argument when it adopted the program in 2018, and even the Third Circuit Court of Appeals agreed with the FCC and NAB by upholding the definition of "comparable" markets based on the number of radio stations in those markets (*i.e.*, the same basis that Congress used to define radio market tiers in the 1996 Act and that the FCC's radio ownership rules still use to define market tiers). See *Prometheus Radio Project v. FCC*, 939 F.3d 567, 582-84 (3d Cir. 2019).

⁴⁹ Allen Media Group, for example, agreed that access to and cost of capital is a difficult problem for broadcasters, and stated that it would work with the FCC to formulate a solution. Allen Media Comments at 9 (suggesting that government guaranteed loans could help level the unequal playing field for capital).

B. Parties Still Touting Structural Ownership Rules as the “Solution” for Low Levels of Diverse Broadcast Station Ownership Willfully Ignore Decades of Experience and Again Fail to Offer Evidence Supporting Their Position

The Commission has maintained structural ownership rules for nearly three-quarters of a century. During this time, minority and female ownership of broadcast outlets has remained stubbornly and disappointingly low. Despite decades of experience to the contrary, Free Press, UCC and other commenters still insist that retaining ownership restrictions remains key to promoting women and minority ownership of broadcast stations.⁵⁰ But these commenters have not shown that structural ownership rules effectively foster diverse ownership. This failure is unsurprising, as the 80 years of ownership restrictions *not* resulting in significant levels of minority/female station ownership would seem to disprove a causal connection between the two. In their submissions here, moreover, commenters predictably failed to show (or even tried to establish) through statistical analysis that changing the current rules would harm minority/female ownership in the future, as the Supreme Court has indicated may be required.

As an initial matter, NAB wonders how strict Free Press, UCC and other commenters believe the ownership rules must be before their alleged ability to promote diverse new entry becomes evident. In the mid-1970s, for example, the FCC’s rules: (1) set the national TV cap at seven stations; (2) prohibited the common ownership of more than one TV station in the same local market; (3) banned the common ownership of a newspaper and even a single radio or TV station in the same market; (4) prohibited common ownership of one radio station (or an AM/FM combo) and a single TV station in the same market; (5) banned the common ownership of a cable TV system and a broadcast TV station in the same area; (6)

⁵⁰ See Free Press Comments at 4, 22; UCC Comments at 1-2; MMTTC Further Comments at 2; NABOB Comments at 1-2.

set the national radio cap at seven AM and seven FM stations; and (7) prohibited common ownership of more than one radio station in the same service in the same local market.

Yet despite years of such severe ownership restrictions, the FCC reported in 1978 that minorities “control[led] fewer than *one percent*” of the commercial radio and TV stations in the U.S.⁵¹ – a figure noticeably lower than today, when ownership limits are looser.⁵² And directly contrary to commenters’ insistence that stricter ownership rules foster diverse ownership, the Commission found in 2016, citing its own data and data from NTIA and Free Press, that minority ownership of radio stations grew after the 1996 Act and that minority ownership of TV stations increased following the modest loosening of the local TV rule in 1999.⁵³ Indeed, the FCC concluded then that “[n]o data provided in the record support a contention that the [local TV] duopoly rule has reduced minority ownership or suggest that a return to the one-to-a-market rule would increase ownership opportunities for minorities and women,” or that “tightening the local radio ownership limits would promote ownership opportunities for minorities and women.”⁵⁴ Earlier in that same quadrennial review proceeding, moreover, the Commission had stated its “agree[ment] with commenters, including NAB, that the low level of minority and female broadcast ownership

⁵¹ Minority Ownership Policy Statement, 68 FCC 2d at 981 (emphasis in original).

⁵² In 2019, ethnic and racial minorities held a majority interest in 13 percent of all commercial AM stations, 7.3 percent of commercial FM stations and 6.1 percent of full-power commercial TV stations. Minorities also held majority interests in 17.3 percent and 13.7 percent, respectively, of all low power TV and Class A TV stations. Media Bureau and Office of Economics and Analytics, *Fifth Report on Ownership of Broadcast Stations*, DA 21-1101, at 25, 30, 35, 40, 45 (Sept. 2021).

⁵³ See 2016 Ownership Order, 31 FCC Rcd at 9895, 9911-12.

⁵⁴ *Id.* at 9895, 9912.

cannot be attributed solely or primarily to consolidation.”⁵⁵ Instead, the FCC recognized “many disparate factors, including, most significantly, access to capital, as longstanding, persistent impediments to ownership diversity in broadcasting.”⁵⁶

Remarkably, in light of eight decades of history and the FCC’s findings under Chairman Tom Wheeler, Free Press and UCC remain so fixated on the bogeyman of “massive” consolidation⁵⁷ that they appear incapable of offering concrete proposals that stand a real chance of effectively promoting new entry and ownership diversity. Their “solution” – maintaining an eighth and ninth decade of asymmetric ownership restrictions that discourage investment in broadcasting – is illusory.⁵⁸ Indeed, UCC and Free Press here failed to acknowledge, or even refer to, the real impediment to diverse new entry, the lack of access to capital by women and people of color, thereby casting doubt on their devotion to

⁵⁵ *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4470 (2014) (2014 Quadrennial FNPRM).

⁵⁶ *Id.* at 4470-71.

⁵⁷ Free Press Comments at 9. Even if Free Press were correct about “massive” consolidation in broadcasting today, relatively recent increases in common ownership do not support claims that such consolidation has caused the current low levels of minority/female ownership and cannot explain why there were much lower – indeed, nearly non-existent – levels of minority ownership during the many decades when extremely strict FCC ownership rules prevented virtually all common ownership. In any event, Free Press and others routinely exaggerate the levels of common ownership in broadcasting. According to BIA Media Access Pro (as of September 16, 2021), there were 4,572 separate owners of full power commercial and noncommercial AM/FM radio stations in the U.S., and 7,058 separate owners of all radio outlets (counting full power, translators and LPFM stations). BIA also reported 361 separate owners of full power commercial and noncommercial TV stations in the U.S., and 1,058 separate owners of all TV outlets (counting full power, Class A, low power and translator stations).

⁵⁸ See NAB Supplemental Comments at 15-19 (explaining that asymmetric regulation of broadcasting impedes investment and new entry by making the broadcast industry a less attractive business opportunity relative to others in the communications market).

effectively promoting diversity of ownership in broadcasting, rather than opposing any changes whatsoever to the broadcast ownership rules.⁵⁹

Perhaps more remarkably, UCC and Free Press provided no new studies or data, nor proposed new study designs, that would assist the Commission in establishing an evidentiary basis for any measures to foster ownership diversity. Indeed, they even failed to offer evidence supporting their fervent claims that the existing structural ownership rules are needed to promote minority/female ownership. In lieu of providing actual evidence, Free Press complained that the FCC has been derelict in “collect[ing] data and studies on the harms that consolidation causes to media ownership diversity,” seeming to presume in advance the outcome of any such studies.⁶⁰ For its part, UCC accused the Commission of “[d]elay, obfuscation and inertial” [sic] in failing to conduct comprehensive analyses of the state of media ownership diversity and its causes and remedies, and reiterated a 2014 laundry list of tasks for the Commission to undertake in this regard.⁶¹

⁵⁹ Previously, in response to the FCC’s notice inquiring how to structure an effective broadcast incubator program, these parties refused to engage constructively, with UCC stating that answering the notice’s questions was “pointless.” Comments of UCC, *et al.*, MB Docket No. 17-289, at 3-4 (Mar. 9, 2018). Many current and former minority and female broadcasters, as well as industry analysts and station brokers, did not agree, explaining to the FCC the seriousness of the lack of access to capital problem and supporting an incubator program for new entrants as a helpful measure to address that problem. See, e.g., NAB Supplemental Comments at 13-14 and note 29 (listing numerous letters supporting proposed incubator program); Comments of Skip Finley, MB Docket No. 17-289 (Mar. 9, 2018). While NAB supported and continues to support the FCC’s incubator program, Free Press, UCC, Common Cause and others challenged the program at the Third Circuit and (unsuccessfully) supported the Third Circuit’s decision vacating the program at the Supreme Court. It is telling that these advocacy groups went so far as to seek judicial elimination of the only program the FCC had approved for many years to address the greatest barrier to diversity in broadcasting.

⁶⁰ Free Press Comments at 8; see *also id.* at 20-21.

⁶¹ UCC Comments at 8-11 and attached Joint Reply Comments of UCC and Common Cause, MB Docket No. 14-50 (Sept. 8, 2014) (2014 UCC Joint Reply Comments).

Among these tasks, UCC here reemphasized its direction to the Commission to “conduct a sophisticated and thoughtful consideration of how to measure viewpoint diversity.”⁶² In so doing, UCC blithely ignored the FCC’s 2016 conclusion that neither it nor commenters in the 2010 and 2014 quadrennials had been able to identify evidence or studies demonstrating a connection between either minority or female ownership and viewpoint diversity, or even to “devise study designs that are likely to provide such evidence.”⁶³ The Commission then went on to identify several significant problems impeding the study of the connection between diversity of viewpoint and ownership, including the “lack of a reliable measure of viewpoint.”⁶⁴ But just as commenters in the 2014 quadrennial, including UCC specifically, “did not provide any additional evidence, studies, proposed study designs, or other information” relevant to the FCC’s analysis of these issues,⁶⁵ UCC has again failed to do so here. Merely resubmitting materials found inadequate by the Commission in 2016 scarcely bolsters UCC’s diversity arguments.⁶⁶

⁶² UCC Comments at 8.

⁶³ 2016 Ownership Order, 31 FCC Rcd at 9995; see *also id.* at 9987-88.

⁶⁴ *Id.* at 9995 note 944.

⁶⁵ *Id.* at 9995.

⁶⁶ As NAB has explained, the FCC’s and commenters’ apparent inability to demonstrate a clear link between ownership and viewpoint diversity is unsurprising, given the extensive scholarship concluding that factors other than separate ownership primarily drive viewpoint diversity on media outlets. In the 2014 quadrennial, NAB provided a non-exhaustive list of 15 empirical and theoretical studies from economists, political scientists and other scholars showing that market forces, especially consumer preferences, primarily drive media “slant” and diversity in coverage. See Comments of NAB, MB Docket No. 14-50, at 79-81 and Attachment C (Aug. 6, 2014) (identifying and describing the studies); Comments of NAB, MB Docket No. 18-349, at 67-68 and notes 261-262 (Apr. 29, 2019) (NAB 2018 Quadrennial Comments) (identifying additional and discussing several of these studies, including ones commissioned by the FCC). In fact, rather than establishing a solid connection between broadcast ownership structures and diversity, those conducting studies for earlier quadrennial reviews were “struck by how little evidence we are able to find for a robust

Moreover, UCC's and Free Press's calls for the FCC to conduct multiple studies and analyses, while providing none of their own, has a very familiar ring,⁶⁷ as does UCC's reliance on Free Press studies from 2007. UCC lauded these 14-year-old studies as "the thus-far gold standard" studies the Commission should "emulate,"⁶⁸ even though the Supreme Court in *Prometheus* critiqued the Free Press studies as "purely backward-looking" and "offer[ing] no statistical analysis of the likely *future* effects of the FCC's proposed rule changes on minority and female ownership."⁶⁹

influence of specific elements of market structure on diversity." L. George and F. Oberholzer-Gee, *Diversity in Local Television News*, at 14 (2011). Accord A. Rennhoff and K. Wilbur, *Local Media Ownership and Viewpoint Diversity in Local Television News*, at 22 (2011) (finding associations between various ownership variables and diversity to be "statistically indistinguishable from zero"); see also L. Vavreck, S. Jackman, and J. Lewis, *How the Ownership Structure of Media Markets Affects Civic Engagement and Political Knowledge, 2006-2008*, at 2 (2011) (finding that the ownership variables studied, including the number of independent TV owners in local markets, had no impact on civic or political engagement or knowledge). Rather than decreasing diversity, past studies have indicated that the opposite may be true because a common owner has fewer incentives to air similar content on both stations, which would "serve a similar audience and cannibalize viewers from one another." George and Oberholzer-Gee, *Diversity in Local Television News* at 2, 14-15, 18 (emphasizing the importance of "business-stealing incentives" and finding that "greater concentration increases the number of politicians that are covered in local news"). A 2012 update to Rennhoff and Wilbur, *Local Media Ownership and Viewpoint Diversity in Local Television News*, found that viewpoint diversity is positively associated with increases in the number of co-owned TV stations within a market. See also M. Spitzer, *Television Mergers and Diversity in Small Markets*, 6 J. Competition L. & Econ. 705 (2010) (concluding that allowing jointly owned TV stations in small markets would produce viewpoint diversity in local news and public affairs programming). Such conclusions undermine one of the fundamental rationales for retaining local ownership rules and support their modernization.

⁶⁷ *Prometheus*, 141 S. Ct. at 1160 (concluding that agencies have no legal obligation to conduct their own empirical or statistical studies, and observing that the FCC had repeatedly asked commenters to submit such studies on the relationship between the ownership rules and minority/female ownership).

⁶⁸ UCC Comments at 8; see Free Press Comments at 21 (citing one of its 2007 studies).

⁶⁹ *Prometheus*, 141 S. Ct. at 1159-60 (emphasis added) (also noting that the 2007 studies had shown a "long-term *increase* in minority ownership" following relaxation of the local TV and radio ownership rules in the 1990s) (emphasis added).

Since UCC's "gold standard" of diversity studies lead the Supreme Court to find that "no commenter produced such [empirical or statistical] evidence indicating that changing the rules was likely to harm minority and female ownership,"⁷⁰ then one must wonder whether UCC is capable of producing the necessary evidence or proposing study designs potentially leading to such empirical or statistical evidence. The reluctance of UCC and Free Press to undertake or propose new, specific studies may stem from their suspicion that rigorous studies responding to the Supreme Court's critique would not produce results supporting either their *idée fixe* or other measures they favor, such as "[r]emedial actions based on historic discrimination."⁷¹

For all these reasons, the Commission should focus their efforts on measures to address the lack of access to capital problem, rather than trying to justify out-of-date structural ownership rules that discourage investment in broadcasting in the forlorn hope that, after 80 years of failing to do so, these rules will someday, somehow, foster materially greater minority and female station ownership. The D.C. Circuit Court of Appeals previously

⁷⁰ *Id.* at 1160.

⁷¹ UCC Comments at 9; *accord* Free Press Comments at 4, 8. These parties left constitutional issues largely unaddressed, with UCC only briefly referring to its 2014 discussion of constitutional questions in connection with its support for remedial measures. See UCC Comments at 9, citing 2014 UCC Joint Reply Comments. The Commission in 2016, however, found no evidence in the record "sufficient to satisfy the constitutional standards to adopt race- or gender-conscious measures" and that no commenter had "proposed actionable study designs that would likely provide the evidence necessary to support race- and/or gender-conscious measures." 2016 Ownership Order, 31 FCC Rcd at 9987. The FCC concluded that "[a]ssuming a reviewing court could be convinced that diversity of viewpoint is a compelling governmental interest" (and noting the law was "unsettled" on that point), the record did not demonstrate a connection between minority ownership and viewpoint diversity "direct and substantial enough to satisfy strict scrutiny" or "sufficiently strong" to satisfy intermediate scrutiny in the case female ownership. *Id.* at 9987-89. No commenter here provided evidence to establish this required connection or any other relevant constitutional analysis.

found a major FCC criterion for licensing broadcast applicants arbitrary and capricious because the Commission – after (only) 28 years of experience with that criterion – had accumulated no evidence that it achieved the benefits that the FCC attributed to it.⁷² Time has run out on the notion that structural ownership rules effectively promote diverse new entry and minority and female station ownership, as the Commission, at least momentarily, appeared to recognize in its last quadrennial review proceeding.⁷³

C. Other Diversity-Related Arguments for Retaining Outdated Ownership Rules Are Illogical and Unconvincing

Certain commenters offered other diversity-based arguments to support retention of the FCC’s current local TV and radio rules. These claims range from silly to unconvincing.

To start with the former, SAG-AFTRA opposed relaxation of the local ownership rules, nonsensically claiming that today, only five media “conglomerates” – Comcast, Walt Disney, News Corporation, ViacomCBS and AT&T/Warner Media – “control the large majority” of the flow of information.⁷⁴ SAG-AFTRA apparently lives in an alternate universe lacking the internet and inconsequential companies such as Google, Facebook, Amazon, Apple and Netflix. It beggars belief that anyone today could express concerns about the flow of information to the public without addressing giant technology platforms like Google, which,

⁷² See *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993).

⁷³ In 2014, the FCC stated that, “considering the low levels of minority and female ownership,” it did not believe that “the [newspaper] cross-ownership ban has protected or promoted minority or female ownership of broadcast stations in the past 35 years, or that it could be expected to do so in the future.” 2014 Quadrennial FNPRM, 29 FCC Rcd at 4455. It also recognized that “[t]o the extent that governmental action to boost ownership diversity is appropriate and in accordance with the law,” any such action should not “be in the form of indirect measures that have no demonstrable effect on minority ownership and yet constrain all broadcast licensees.” *Id.* at 4456-57.

⁷⁴ Comments of Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA), MB Docket No. 18-349, at 3-4 (Sept. 2, 2001) (SAG-AFTRA Comments).

as of August, had an 87.9 percent share of the entire U.S. search engine market.⁷⁵ As detailed in NAB's comments, any party concerned about the public's ability to access local news and information should focus on the scale, scope and practices of the tech platforms that disadvantage local news outlets,⁷⁶ rather than opposing changes to antiquated FCC rules that prevent broadcasters from acquiring a second TV station in many markets or another AM or FM station in the largest radio markets.

Putting aside SAG-AFTRA's internet blinkers, its claim that the power of a very small number of media conglomerates requires the retention of the local radio and TV ownership rules makes little sense.⁷⁷ According to Kagan, four of the five companies identified by SAG-AFTRA own *no* radio stations in the U.S., and the fifth (Disney) owns *one*.⁷⁸ Relaxing the local radio caps is irrelevant to any claims about the alleged power of these entities. One of the named companies (AT&T/Warner Media) owns *zero* TV stations and Disney owns only *eight*. In total, these five master-of-the-universe companies own a combined 92 TV stations,⁷⁹ out of the 1,373 full power commercial TV stations, the 1,757 full power commercial and noncommercial TV stations, and the 4,128 full power, Class A and low power TV outlets in the country.⁸⁰ Again, SAG-AFTRA's claims that loosening the local TV rule will lead to a dearth

⁷⁵ statcounter Global Stats, <https://gs.statcounter.com/search-engine-market-share/all/united-states-of-america>

⁷⁶ NAB Supplemental Comments at 23-28 and Attachments A and B.

⁷⁷ SAG-AFTRA Comments at 3-4.

⁷⁸ Kagan, a media research firm within S&P Global Market Intelligence, TV and Radio Stations by Market and Analysis databases (as of June 30, 2020).

⁷⁹ See Justin Nielson, *Top 50 US TV station groups*, Kagan, a media research firm within S&P Global Market Intelligence (May 10, 2021).

⁸⁰ FCC News Release, *Broadcast Station Totals as of June 30, 2021* (July 12, 2021). See also Section IV.B., *supra* (explaining that consolidation in the broadcast industry is frequently overstated).

of information to the public does not hold up, particularly in a content marketplace increasingly fragmented by online video and audio content providers and increasingly dominated by tech platform gatekeepers.⁸¹

UCC and Free Press also again argue that because communities of color and low-income communities disproportionately depend on local media, including broadcast, the Commission should retain analog-era ownership restrictions.⁸² This argument makes several unsupported and unconvincing leaps of (il)logic.

First, it assumes that station ownership will automatically become materially less diverse if the structural ownership rules are relaxed, and, thus, stations will be less able to service communities of color. NAB, however, showed in its comments, and in the discussion above, that the maintenance of structural ownership rules since the Roosevelt Administration has not effectively fostered minority/female ownership and today serves to discourage investment in the broadcast industry, reduce the availability of capital for both existing and prospective broadcasters and make non-broadcast business opportunities comparatively more inviting.⁸³

⁸¹ See NAB Supplemental Comments at 23-28, 69-75, 87-92, Attachment A at 9-16, Attachment F, Attachment H, and Attachment I.

⁸² UCC Comments at 2-3; Free Press Comments at 4. To support its position, UCC again included long block quotes from an amicus brief filed with the Supreme Court in *Prometheus*. UCC Comments at 3. One might question the persuasive force of amicus briefs supporting the parties that lost a Supreme Court case 9-0.

⁸³ NAB Supplemental Comments at 15-19. This argument also assumes that stations owned by women or members of minority groups will provide more responsive content with more diverse viewpoints. As discussed in Section IV.B., *supra*, the strength of any connection between viewpoint diversity and minority or female ownership specifically has not been established, and numerous studies have found marketplace factors, including consumer preferences, to be important drivers of media “slant” and diversity in coverage.

Second, UCC's and Free Press's argument is another restatement of their presumption that common ownership automatically makes stations less capable of serving their local communities or that commonly-owned stations provide programming less responsive to, or even less accessible to, audiences reliant on that programming. These assumptions are invalid.⁸⁴

NAB and broadcasters previously explained that broadcast stations have strong incentives to offer locally-oriented content, including news, which helps them stand out in a crowded media landscape, thereby maximizing their audiences and advertising revenues.⁸⁵ Thus, any suggestions that broadcasters will have diminished or no incentives to offer local news or other community-responsive programming attractive to audiences if the FCC

⁸⁴ In 2019, for example, UCC, the National Hispanic Media Coalition (NHMC) and others submitted comments opposing any relaxation of the ownership rules, citing the FCC's mandate to ensure that broadcast "services continue to be accessible for *all* Americans, including communities of color." Comments of NHMC, *et al.*, MB Docket No. 18-349, at 8-9 (Apr. 29, 2019) (emphasis in original) (also stressing that large populations of the U.S. still rely on free, local broadcasts). As NAB pointed out then, commonly-owned stations and their programming are not somehow less accessible to any audiences than a stand-alone station. See Reply Comments of NAB, MB Docket No. 18-349, at 13-14 (May 29, 2019) (NAB 2018 Quadrennial Replies). The fact that audiences rely on local stations simply does not support a leap to concluding that the existing ownership rules must be maintained.

⁸⁵ See NAB 2018 Quadrennial Comments at 59-60; NAB Supplemental Comments at 92-93. See also Comments of Nexstar Media Inc., MB Docket No. 18-349, at 17 (Sept. 2, 2021) (Nexstar Comments) (explaining that the incentives for TV stations to provide high-quality programming are "higher than ever," given intense marketplace competition, and that stations "lack any incentive to homogenize programming or reduce local service"); Comments of TEGNA Inc., MB Docket No. 18-349, at 3, 5-6 (Sept. 2, 2021) (TEGNA Comments) (strongly disputing that limits on local TV station ownership are needed to motivate broadcasters to invest in local content, and identifying "intermodal competition for advertising and viewership" as a "key factor[]" driving the production of local content" by TV stations, which allows broadcasters to differentiate themselves from other content providers).

changes the ownership restrictions are erroneous, as well as contrary to evidence.⁸⁶ Such an argument is also nonsensical, as parties opposing ownership rule reform do not explain how the numerical ownership limits – rather than market forces or other FCC rules and policies under the Communications Act requiring stations to serve their communities of license – actually incentivize local stations to provide responsive content or why changing the ownership limits would reduce those incentives. As the D.C. Circuit has explained, one should “be skeptical when regulatory agencies” (or commenting parties) “promote organizational forms that private enterprise would not otherwise adopt,” especially when the agencies are trying to accomplish something “essential to the survival and prosperity of firms in an ordinary market – such as ensuring that a business identifies and fills available market niches [and] is responsive to its customers.”⁸⁷

UCC’s and Free Press’s reasoning can best be described as backwards. The reliance by the public, including lower-income audiences and communities of color, on local broadcast stations is not a reason for retaining the current ownership restrictions. Instead, that reliance is an important reason for the Commission to ensure its ownership rules allow local broadcasters to achieve the local scale and attendant efficiencies necessary for them to thrive (or even survive) in today’s competitive media and advertising markets.⁸⁸ Although UCC expressed concern for those living in rural areas with low broadband penetration,⁸⁹

⁸⁶ Empirical studies have shown that common ownership of two TV stations in the same local market tends to increase viewership. See NAB Supplemental Comments at 31, 94 and note 325. If commonly-owned stations offered less community-responsive programming, then the resulting viewing trends would be contrariwise.

⁸⁷ *Bechtel v. FCC*, 10 F.3d 875, 881 (D.C. Cir. 1993).

⁸⁸ See NAB 2018 Quadrennial Replies at 12-16.

⁸⁹ UCC Comments at 3.

these smaller TV and radio markets with limited economic bases are precisely where stations need regulatory relief most urgently to ensure their continued financial viability and their ability to provide quality local services, including news.⁹⁰ NAB agrees that important issues relating to broadband access need to be addressed, but maintaining restrictions on ownership of radio and TV stations does nothing to resolve that problem. As shown above and in our previous comments, outdated broadcast-only rules serve to competitively disadvantage the remaining free, over-the-air sources of local news, weather, sports and emergency information to the detriment of local audiences, especially those communities most reliant on broadcast stations.

V. DESPITE MVPDS' INSISTENCE THAT LOCAL TV JOURNALISM FACES NO THREATS, THE RECORD SHOWS THE IMPORTANCE OF TV STATIONS LEVERAGING ECONOMIES OF SCALE TO SUPPORT RESOURCE-INTENSIVE LOCAL NEWS PRODUCTION

In numerous filings and studies over the past decade and more, NAB and broadcasters have shown the importance of reforming the local ownership rules so that stations may leverage economies of scale to enhance their production of local programming, including news. In our most recent comments, NAB explained why achieving greater local scale is more vital than ever, due to the unprecedented number of competing audio and video outlets and the technology platforms' increasing market dominance. Because ATVA, as

⁹⁰ See, e.g., NAB Supplemental Comments at 31-37 and Attachments C and D (citing extensive data and several studies showing that radio and TV stations in mid-sized and small markets earn very limited advertising revenues, with many struggling to maintain their financial viability and their local news operations); Comments of Connoisseur Media, LLC, et al., MB Docket No. 18-349, at 26-29 and Exhibit C, Decl. of W. Lawrence Patrick (Sept. 2, 2021) (explaining that there are increasingly no buyers for the growing numbers of struggling AM and FM stations other than a same-market competitor who often may not be allowed to purchase the troubled stations due to the radio ownership caps, and, thus, more radio stations, especially in mid-sized and small markets, remain unable to maintain a significant local presence or offer a high level of local services); Section V., *infra* (identifying other studies and evidence demonstrating that many smaller markets are unable to support independent news operations).

part of its predictable opposition to relaxing the local TV rule, resisted the very idea that local TV journalism is under stress, NAB briefly summarizes relevant comments, studies and FCC decisions that ATVA completely (or virtually) ignored:

- In our supplemental comments and detailed written testimony to Congress, NAB explained that the giant tech platforms' dominance of both content discovery and digital advertising is placing local broadcast stations and their news operations under increasing duress. Decisions made unilaterally by a few tech platforms impede local stations' ability to connect with their audiences online, and the platforms' technological control and lack of transparency also permit them to impose advertising limits and policies that impede local stations' ability to effectively monetize their own content online, including news.⁹¹ A 2021 study quantified the economic losses to broadcasters from certain practices of the big tech platforms, estimating close to \$2 billion in annual loss of value to broadcasters.⁹²
- A 2021 study by the FCC's Office of Economics and Analytics (OEA) found a strong relationship between the number of independent local TV news operations in a market and market size, with only a limited number of larger markets able to support four independent news operations. Given the inability of most TV markets to economically sustain four news operations, the OEA Study concluded that mergers eliminating a source of local news programming may be "optimal," if the "merged entity improves the quality or increases the quantity of local news programming."⁹³ Given that the clear majority of TV markets cannot sustain four independent local news operations, the rule keeping local TV stations in increasingly uncompetitive ownership structures needs reform.
- Multiple economists have concluded that TV broadcasting generally, and local news production specifically, are "subject to strong economies of both scale and scope,"

⁹¹ NAB Supplemental Comments at 23-28 and Attachment A (detailing specific practices of the tech platforms that disadvantage local stations).

⁹² *Id.* at Attachment B, BIA Advisory Services, *Economic Impact of Big Tech Platforms on the Viability of Local Broadcast News* (May 2021). Other recent analyses agree that, due to the ways in which digital platforms like Google and Facebook direct attention to national outlets and aggregators, the tech platforms divert traffic and advertising dollars away from local news outlets. See, e.g., S. Fischer, K. Jaidka and Y. Lelkes, *Auditing local news presence on Google News*, 4 *Nature Human Behavior* 1236, 1243 (Dec. 2020); J. Legum and T. Zekeria, *How Facebook's algorithm devalues local reporting*, *Popular Information* (June 22, 2021).

⁹³ K. Makuch and J. Levy, *Market Size and Local Television News*, OEA Working Paper 52, at 4, 21 (Jan. 15, 2021) (OEA Study). ATVA made a less than half-hearted attempt in a footnote to question the OEA Study. See ATVA Comments at note 9. However, ATVA did nothing to undermine its statistically significant central findings that most TV markets outside of the top few dozen cannot economically support four independent TV news operations and that further station combinations may be needed to ensure sustainable local news production.

which are, by definition, “associated with falling unit costs of production” and “hence are *prima facie* welfare enhancing.”⁹⁴ As a result, placing undue limits on broadcasters’ ability to achieve scale economies through ownership restrictions “result[s] in higher costs, lower revenues, reduced returns on invested capital [and] lower output,” including “significantly reduc[ed]” local news output.⁹⁵

- Broadcasters could expand or improve their local news operations if permitted to achieve greater scale by acquiring another outlet in local markets, thereby more widely spreading the documented high costs of local news production.⁹⁶ In its most recent ownership order, the FCC agreed that reforming the local TV rule would help broadcasters “achieve economies of scale,” “improve their ability to serve their local markets” and enable the provision of “more high-quality local programming.”⁹⁷ Studies in the record in multiple earlier quadrennial reviews agreed with the FCC’s 2017 conclusions.⁹⁸ The Third Circuit Court of Appeals, when confirming the FCC’s

⁹⁴ J.A. Eisenach and K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV broadcasting*, at 1-2 (Economies of Scale Study), attached to Reply Comments of NAB, MB Docket No. 10-71 (June 27, 2011); accord Declaration of M. Israel and A. Shampine, Comments of NAB, MB Docket No. 10-71, at Appendix B ¶¶ 49-51 (June 26, 2014) (finding that economies of scale and scope exist in TV broadcasting and that both lead to “increased investment in news programming”).

⁹⁵ Economies of Scale Study at 2-3.

⁹⁶ See, e.g., NAB Supplemental Comments at 29-30 (documenting news costs and the much greater amounts that stations in larger markets with more resources can spend on local news); *2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9836 (2017) (2017 Reconsideration Order) (finding that local news programming is one of the largest operational costs for TV broadcasters); BIA Advisory Services, *The Impact on the Amount of News Programming From Consolidation in the Local Television Station Industry* (Sept. 23, 2020) (BIA TV News Study), attached to *Ex Parte* Communication, Gray Television, Inc., MB Docket No. 18-349 (Oct. 13, 2020) (reporting that, based on data from NAB’s Television Financial Reports, news operations accounted for 33.5 percent and 33.1 percent of the total expenses of ABC/CBS/NBC affiliates nationwide in 2014 and 2018, respectively); TEGNA Comments at 8-9 (stating it spends about \$300 million per year on production of news and local content).

⁹⁷ 2017 Reconsideration Order, 32 FCC Rcd at 9834, 9836. Recent commenters provided additional real-world examples of local scale enabling greater investment in high-quality local content. See Nexstar Comments at 18-19 (illustrating how commonly owning two top-four ranked stations in a market resulted in more news programming, other local public affairs programming, town halls on important issues and local sports specials); TEGNA Comments at 9 (explaining that commonly owning two stations enabled expanded news and other local programming including sports in multiple markets and, in 2020, enabled the airing of a school district’s virtual lessons for elementary school students).

⁹⁸ For example, previous studies found that common ownership of TV stations in the same local market “has a large, positive, statistically significant impact on the quantity of news

finding in an earlier quadrennial review that “[c]onsolidation can improve local programming,” cited studies showing that commonly owned TV stations were more likely to carry local news than other stations and that TV stations improved their ratings after becoming commonly owned.⁹⁹ The FCC’s reasoning in 2017 logically supports modernization of the *per se* ban on top-four station combinations on the grounds that it harms, rather than fosters, localism.

- Mid-sized and small markets have smaller economic bases and lower levels of available advertising revenues. As a result, broadcast stations in those markets earn but a fraction of the ad revenues as stations in large markets. In 2019 and 2020, the average TV station in DMAs 151-210 and DMAs 101-150 earned only about nine percent and 14 percent, respectively, of the ad revenues of the average top-10 DMA station.¹⁰⁰ TV stations in mid-sized and small DMAs thus have orders of magnitude lesser resources to devote to programming, which directly impacts their provision of local news. The Radio Television Digital News Association (RTDNA) newsroom surveys have found that larger market stations and those with the resources to hire more staff produce more hours of local news than small market stations and those with smaller staffs.¹⁰¹ Empirical studies conducted over the course of decades consistently have found a “positive and statistically significant relationship between [station] revenue and local news production.”¹⁰²
- Many smaller markets cannot generate sufficient advertising revenues to sustain four separate news operations, as the FCC found in 2021 and a decade earlier.¹⁰³ Thus, TV stations in these markets even more urgently need local scale economies

programming,” FCC, Ownership Study No. 4, Section 1, D. Shiman, *The Impact of Ownership Structure on Television Stations’ News and Public Affairs Programming*, at 21 (2007), and increases the likelihood of stations offering local news or public affairs programming. M.G. Baumann and K.W. Mikkelsen, Economists Incorporated, *Effect of Common Ownership or Operation on Television News Carriage: An Update*, at 6-7, Attachment A, NAB Reply Comments, MB Docket No. 06-121 (Nov. 1, 2007).

⁹⁹ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 415 (3d Cir. 2004).

¹⁰⁰ NAB Supplemental Comments at 33, note 90 and Attachment D (also showing that the average station in DMAs 51-100 earned only around one fifth of the ad revenues earned by the average top-10 DMA station in 2019 and 2020). The same pattern holds for radio stations. *Id.* at 33 and Attachment C.

¹⁰¹ NAB Supplemental Comments at 32, 34 and notes 86, 87 and 91 (citing RTDNA surveys from 2018, 2019 and 2021).

¹⁰² Economies of Scale Study at 45-46; see also NAB Supplemental Comments at 32 and note 86.

¹⁰³ OEA Study at 4; *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 at ¶ 53 and note 117 (2011) (citing staff analysis that found only 22.5 percent of smaller markets (those with six or fewer TV stations) were served by four local news operations).

gained through common ownership of multiple outlets. When modestly reforming the local TV rule in 2107 by eliminating the eight voices test, the FCC expressly recognized that the markets most affected by this restriction – “small and mid-sized markets that have less advertising revenue to fund local programming – are the places where the efficiencies of common ownership can often yield the greatest benefits.”¹⁰⁴ And due to the large operational costs of local news production, the FCC found that common ownership enables the provision of high-quality local programming, particularly in “revenue-scarce small and mid-sized markets.”¹⁰⁵

- The FCC’s 2017 decision strongly supports reforming the across-the-board prohibition on top-four station combinations, especially in mid-sized and small markets. Heritage Broadcasting, a small TV broadcaster, urged the FCC to allow such combinations in DMAs 100+ and provided a report on the value of common ownership for improving local news in small markets.¹⁰⁶ This report and Heritage’s comments explained how news coverage in small markets has suffered from the shift of local ad dollars from local media outlets to national digital platforms; how this pressure on revenue prevents local broadcasters from improving their news content and will result in stations continuing to lose strength (as newspapers already have done); and how local TV stations’ inability to combine under FCC rules compounds their problems.¹⁰⁷

Despite this plethora of evidence, ATVA claimed that TV broadcasters do not need to engage in further local market combinations because TV news is not in any jeopardy.¹⁰⁸ As an initial matter, its argument that local broadcast journalism is not under stress should be taken with an eyebrow-raising degree of skepticism, given ATVA’s incentives to make any

¹⁰⁴ 2017 Reconsideration Order, 32 FCC Rcd at 9836. Similarly, small markets are the ones most affected by the top-four restriction.

¹⁰⁵ *Id.*

¹⁰⁶ Comments of Heritage Broadcasting of Michigan, MB Docket No. 18-349 (Sept. 2, 2021) (Heritage Comments), attaching *The Value of Cross Ownership to Improving Local News in Small Markets*, Kent S. Collins, Professor Emeritus, Missouri School of Journalism (Collins Report).

¹⁰⁷ Heritage Comments at 3-8; Collins Report at 1-3. As NAB earlier explained, the top-four rule prohibits any TV station combinations in markets with four or fewer full power commercial stations and severely restricts them in markets with only five or six stations. NAB Supplemental Comments at 85. It also prevents any stations ranked among the top four in their markets from combining with another top-four station, even though in many DMAs the third and fourth (and sometimes even the second) ranked stations are competitive “also rans” to the leading station in the market. *Id.* at 85-86.

¹⁰⁸ ATVA Comments at 4.

and all arguments to either keep the Commission from relaxing the local TV rule or persuading it to tighten the rule. As NAB observed in its comments, pay TV providers support more restrictive ownership rules to disadvantage local TV stations, including in retransmission consent negotiations, but their anti-competitive interests do not equate to the public interest – particularly the public’s interest in quality local news, a product with which ATVA’s members are generally unfamiliar.

To support its erroneous argument about the state of local TV news, ATVA focused on a single recent study, the BIA TV News Study, and even hired an academic to refute it.¹⁰⁹ But its attack on one study involving one company’s stations, while ignoring years of studies and evidence about the economics of local news, does nothing to undermine the overall conclusion supported by the record: that broadcast stations in today’s highly competitive media and advertising markets increasingly depend on leveraging local economies of scale to support news and other local programming production, especially in smaller markets. ATVA’s assertion that local news is “just fine” is belied by the inability of most TV markets in the country to sustain four independent local new operations.

In any event, NAB also takes issue with several of the points made in the Hubbard Comments. While Professor Hubbard entitled his report as “Comments” on the BIA TV News Study prepared by Dr. Mark R. Fratrik, the final section of these Comments contends that

¹⁰⁹ ATVA Comments, at Exhibit A: Report of Professor Thomas Hubbard, *Comments on Dr. Mark R. Fratrik’s “The Impact on the Amount of News Programming from Consolidation in the Local Television News Industry”* (Hubbard Comments). The BIA TV News Study analyzed the hours of local news provided by Gray Television’s stations in its 93 local markets in 2014 and 2020 to determine whether an intervening acquisition affected the amount of local news the stations aired. The study concluded that the additional scale achieved after an acquisition allowed Gray to increase its local news production significantly more than in markets without any acquisitions, and the expansion of local news following an acquisition was most pronounced in smaller markets. See BIA TV News Study at ii-iv, 10-13.

higher retransmission consent revenues would not lead broadcasters to produce more local news.¹¹⁰ But the BIA TV News Study said nothing about retransmission consent revenue – the topic was not raised. Inclusion of this material in a report ostensibly about the BIA Study therefore appears inappropriate and indicative of the influence ATVA had over the contents of the Hubbard Comments.

Moreover, the conclusion that higher retransmission fees would not spur greater investment in local news is based on three paragraphs of discussion with no evidence or data provided and no authority cited. Notably, previous empirical studies have reached contrary conclusions. A major analysis on scale and scope economies in TV broadcasting specifically examined the economics of local news programming and concluded that retransmission consent compensation impacts “broadcasters’ financial viability and increases the output of news and other local content.”¹¹¹ Both the empirical evidence and the logic for this proposition are strong. It is indisputable that retransmission consent revenues “play an important role in broadcast stations’ financial viability.”¹¹² In 2020, Kagan estimated that retransmission revenues represented 38 percent of TV stations’ total

¹¹⁰ *Id.* at 12-13.

¹¹¹ Reply Declaration of J.A. Eisenach and K.W. Caves, attached to Reply Comments of NAB, MB Docket No. 10-71, at 9, Heading C (June 27, 2011).

¹¹² *Id.* at 2. The Economies of Scale Study found that “regulatory limits on retransmission consent compensation would significantly reduce investment returns in the broadcasting industry.” *Id.* at 3. Indeed, “inhibiting or foreclosing” such revenues would cause the median U.S. TV station to “earn insufficient profits to cover its cost of capital,” which over an extended period would cause about half of all stations (*i.e.*, all those below the median) to “potentially face shutdown.” *Id.* at 32-33. Since this study was conducted, the advertising market has only become more competitive, leaving TV stations more reliant on revenues from other sources, primarily retransmission consent.

revenues.¹¹³ It is also not seriously disputed that TV stations earning higher revenues produce greater news output.¹¹⁴ Because retransmission consent fees significantly increase TV stations' revenues and because higher-earning stations offer more local news programming, then higher revenues from retransmission consent likely will translate into increased local news production by TV stations, contrary to the Hubbard Comments' off-the-cuff conclusion.

Another study similarly found that the monies earned by broadcasters in retransmission consent fees accounted for over one third of their spending on programming; stated differently, "in the absence of retransmission consent compensation broadcasters would have had to reduce the amount they spend producing content by more than a third."¹¹⁵ Obviously such a reduction in resources available for programming would fundamentally harm local news production, especially given the high operating and capital costs of maintaining local news operations.¹¹⁶ Indeed, retransmission consent revenue is so important to news production that the continuing decline in MVPD subscribership, which

¹¹³ J. Nielson, *Complete picture of US TV station industry revenues, 2009-2026*, Kagan, a media research group within S&P Global Market Intelligence (June 17, 2021).

¹¹⁴ See, e.g., *Economies of Scale Study* at 45-46 (examining numerous studies, including earlier FCC-commissioned ownership studies, and finding a "positive and statistically significant relationship between revenue and local news production"); NAB Supplemental Comments at 32 and notes 86-87 (citing various studies and newsroom surveys finding that TV (and radio) stations earning higher revenues offer more local news and/or public affairs programming and employ higher numbers of news staff).

¹¹⁵ Jeffrey A. Eisenach, *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA Economic Consulting, at ii, 29-33 (July 2014) (further explaining that the revenues broadcasters earn from retransmission consent significantly supplements their revenue from advertising and supports a number of pro-consumer initiatives, including increased "local television news and public affairs programming").

¹¹⁶ See, e.g., NAB Supplemental Comments at 29-30; BIA TV News Study at 6-9.

puts clear downward pressure on TV stations' retransmission consent compensation, has been called a looming "existential" crisis for news on local TV stations.¹¹⁷

Needless to say, ATVA and the Hubbard Comments did not consider TV stations' strong marketplace incentives to provide local news and to use additional resources to support local program production. As the Economies of Scale Study explained in detail, "local news production is a form of investment, as local news programming contributes to a television station's brand reputation, enhances viewer loyalty, and stimulates demand for complementary outputs" and products (e.g., online advertising).¹¹⁸ As discussed in Section IV.C. above, stations also are incentivized to offer locally-oriented programming, including news, to differentiate themselves among an array of competing video and audio options and thus better attract audiences and ad revenues.¹¹⁹ Given the importance of local news in building a station's local reputation and good will and differentiating itself in a crowded market, a station may very likely use increased retransmission consent compensation to invest in their brand equity by improving or offering additional amounts of local news and other local programming. In sum, the three paragraphs on retransmission consent inserted into the Hubbard Comments say much more about the financial incentives of ATVA members than they do about local broadcast stations' incentives to produce local news.

¹¹⁷ Tom Rogers, *Op-ed: Quality TV news could be a casualty of the streaming wars*, CNBC (June 7, 2021). See NAB Supplemental Comments at 30, 97, note 337 and Attachment K (providing data showing that marketplace trends have already substantially cut the rate of retransmission consent fee growth and that the growth rate of total retransmission consent revenue will approach zero and, in real terms, even become negative during the next five years).

¹¹⁸ Economies of Scale Study at 2, 39-42.

¹¹⁹ NAB Supplemental Comments at 92-93; TEGNA Comments at 3, 5-6; Nexstar Comments at 17; NAB 2018 Quadrennial Comments at 59-60.

ATVA and Professor Hubbard additionally claimed that the local TV rule should remain unchanged, or made more restrictive, because broadcasters can achieve any needed economies of scale to support local news by engaging in sharing agreements.¹²⁰ This argument is unconvincing for several reasons. While joint arrangements such as joint sales agreements (JSAs), local marketing agreements (LMAs) and shared services agreements (SSAs) permit realization of limited economies of scale and can help support local news production, contractual arrangements short of common ownership are far from optimal. A rational broadcaster would invest substantially more time and resources in a station it owned. If the relationship between two stations is a limited contractual one for a limited time period, then the financially stronger station has only limited incentives to invest in the weaker station generally or in its local news programming specifically, especially long-term.

ATVA and the Hubbard Comments also ignored the regulatory uncertainty of joint arrangements. In the 2010/2014 quadrennial review, for example, the Commission attributed virtually all TV JSAs, increased regulation on SSAs and considered whether to attribute SSAs.¹²¹ While the FCC later reversed its order attributing TV JSAs, the uncertainty surrounding joint arrangements does not incentivize a broadcaster to invest, particularly long-term, in another local station, given that their joint arrangement might be deemed contrary to the local TV rule by regulatory fiat. ATVA's championing of the virtues of joint arrangements is more than a little hypocritical, given that pay TV commenters in the last quadrennial review "contended that sharing agreements are not in the public interest"¹²²

¹²⁰ ATVA Comments at 5; Hubbard Comments at 5-6.

¹²¹ See 2016 Ownership Order at 9869, 10008, 10022-23.

¹²² 2014 Quadrennial FNPRM, 29 FCC Rcd at 4520.

and that ATVA continued to disparage them here as means to “evade the local [TV] ownership rule.”¹²³

ATVA and Professor Hubbard further failed to account for the greater economies of scale and costs savings that common ownership can achieve beyond those achieved through limited contractual arrangements. As noted above, Heritage Broadcasting, a small TV broadcaster in Michigan, strongly argued for relaxation of the local TV rule in DMAs 100-210.¹²⁴ Heritage estimated that if it were allowed to combine with its shared service partner station, it could achieve a savings of at least \$1 million annually “to be devoted to expanded, in-depth local news and public affairs programming.”¹²⁵ The report on improving TV station news in small markets attached to Heritage’s comments concluded that SSAs and LMAs are “inadequate to provide sufficient cost savings for funding” the journalism small communities need.¹²⁶ For these reasons, claims that sharing arrangements are “good enough” for broadcast TV stations and their services to local communities are flimsy and dismissive of the serious economic challenges facing local media outlets in mid-sized and small markets.

While NAB observes that other criticisms leveled by ATVA and Professor Hubbard against the BITA TV News study are questionable,¹²⁷ a line-by-line refutation of ATVA’s

¹²³ ATVA Comments at i.

¹²⁴ Heritage Comments at 4 (stating that small group owners should be allowed to own more than one top-four station in markets 100+, or those with five or fewer commercial TV stations).

¹²⁵ *Id.* at 14.

¹²⁶ Collins Report at 7.

¹²⁷ For example, the BIA TV News Study is faulted for examining instances of consolidation that did not involve two top-four network affiliates and for not providing sufficient evidence that combinations between two top-four stations lead to increases in the provision of local

comments would miss the larger point. In short, ATVA's opposition to any loosening and its calls for tightening the local TV rule ignore the reality of today's video and advertising markets. The Commission concluded less than a year ago that broadcast TV stations compete with other participants in the video marketplace, namely MVPDs and rapidly growing online video distributors.¹²⁸ Indeed, according to Nielsen's most recent monthly total TV and streaming snapshot, cable still retained the largest share of total TV viewing, following by streaming and then broadcast TV.¹²⁹ Extensive evidence, including a recent empirical study submitted for the record in this proceeding by the Department of Justice, shows that local TV stations directly compete against digital platforms and MVPDs for local advertising revenues.¹³⁰ In this competitive environment, retaining – let alone further tightening – a rule that still prevents owning more than one TV station in many markets, as FCC rules did in 1940, would be arbitrary and capricious and contrary to Section 202(h). As further described below, ATVA's pot pourri of arguments cannot obscure the fact that the

news. ATVA Comments at 6; Hubbard Comments at 9-10. That, however, is hardly surprising, given that FCC's rules have never permitted ownership of two top-four ranked stations (absent a waiver). The regulatory regime necessarily limits the number of such instances of top-four combinations, so the BIA Study also considered the impact of other station combinations on local news.

¹²⁸ 2020 Communications Marketplace Report, 36 FCC Rcd 2945, 3047 (2020) (stating that the video marketplace continues to be defined by these three categories of participants).

¹²⁹ Nielsen, *Back-To-School Presses Pause On Streaming's Gain According To The Gauge* (Sept. 16, 2021). Across all TV homes in the month of August, 38 percent of time spent on TV was with cable, 28 percent was with streaming and 24 percent was with broadcast TV. Ten percent of time spent on TV was with "other" (e.g., VOD, gaming, DVD playback, etc.).

¹³⁰ J. Eisenach, L. Wu, A. Card, R. Kulick, J. Scalf, I. Tasic and M. Ye, *The Evolution of Competition in Local Broadcast Television Advertising and the Implications for Antitrust and Competition Policy*, NERA Economic Consulting (Oct. 2020); NAB Supplemental Comments at 55-63, note 188 (identifying relevant previous NAB submissions) and Attachment E; Nexstar Comments at 7-11; TEGNA Comments at 3-6.

current local TV rule is no longer necessary in the public interest “as the result of competition.”

VI. THE FCC SHOULD REJECT MVPD CALLS TO RETAIN OR TIGHTEN THE OUTDATED TOP FOUR RESTRICTION

NCTA urges the Commission to retain its ban on combinations involving more than one station ranked among the top four in a market, while ATVA contends that the local TV rule should be made even more restrictive by treating multicast streams and secondary services as the equivalent of full service TV stations, urging the FCC to ban broadcasters from airing “Big Four” network content on more than one programming stream or a commonly owned LPTV station. MVPD commenters are merely restyling arguments that have previously failed to persuade either Congress¹³¹ or the Commission¹³² to change retransmission consent laws and rules. The Commission should reject MVPD commenters’ attempts to shoehorn their shopworn, unsupported retransmission consent arguments into a proceeding about broadcast ownership rules. In addition to violating Section 202(h) by making the local TV rule more restrictive, adoption of ATVA’s proposal would contravene both the First Amendment and Section 326 of the Communications Act. Unlike structural

¹³¹ MVPDs lobbied for a wide range of modifications to the retransmission consent regime when Congress was last considering whether or not to reauthorize the Section 119 distant signal license for direct broadcast satellite providers, 17 U.S.C. §119. See, e.g., *Testimony of Robert Thun of AT&T Before the United States Senate Committee on Commerce, Science, and Transportation* (Oct. 23, 2019) at 2-4, available at: <https://www.commerce.senate.gov/services/files/6B755A41-C84E-4FB9-AE65-1D6E88C81A20>. Congress narrowed and made permanent the distant signal license and adopted no changes to retransmission consent laws.

¹³² Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules* (Jul. 14, 2016) available at: <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules> (following an extensive review of the retransmission consent rules, the Commission declined to make modifications, finding that “it is clear that more rules in this area are not what we need at this point”).

ownership regulations that have withstood judicial review in the past, ATVA would have the Commission regulate the programming content broadcasters may or may not air on even a single station, and would embroil the FCC in constitutionally problematic areas where it lacks authority to tread. Moreover, as discussed in detail below, artificially limiting local TV combinations in the manner proposed by MVPDs will harm the public interest without any corresponding benefits to anyone except pay TV companies' bottom lines.

A. MVPD Commenters Fail to Demonstrate that Retaining or Expanding the Top Four Prohibition Will Result in Any Public Benefits

At the core of MVPD claims is the idea that retransmission consent fees are “rising” and that retaining (or further tightening) the top four prohibition of the local TV ownership rule will somehow constrain the runaway retail prices consumers pay for MVPD service.¹³³ Although pay TV providers may wish the law was different, it is well established that the Commission does not have authority to regulate the prices, terms or conditions of retransmission consent. Its authority is limited to ensuring that broadcasters and MVPDs are negotiating in good faith. In Section 325(b)(1), Congress unequivocally forbade any MVPD from retransmitting the signal of a broadcast station without the “express authority” of the originating station.¹³⁴ In adopting this provision, Congress intended “to create a marketplace for the disposition of the rights to retransmit broadcast signals” but *not* to “dictate the outcome of the ensuing marketplace negotiations.”¹³⁵ In this retransmission marketplace, Congress gave the Commission only the narrow authority to ensure that broadcasters and

¹³³ Comments of NCTA – The Internet & Television Ass’n (NCTA), MB Docket No. 18-349, at 2, 4-5 (Sept. 2, 2021) (NCTA Comments); ATVA Comments at 18-20.

¹³⁴ 47 U.S.C. § 325(b)(1).

¹³⁵ S. Rep. No. 92, 102nd Cong., 1st Sess. at 36 (1991).

MVPDs abide by their reciprocal duty to negotiate retransmission consent in “good faith.”¹³⁶ Even if the Commission agreed with the MVPD commenters’ empty claims, the Commission lacks any authority to address MVPDs’ complaints about the level of retransmission consent fees they pay or to otherwise intervene in the retransmission market to set prices.

Even assuming the Commission would not be acting outside the scope of its authority by addressing retransmission consent fees (either directly or through broadcast ownership limits), MVPDs fail to demonstrate that combinations among top four-ranked stations or multicast/LPTV affiliations with the four major broadcast networks have any impact on retransmission consent fees, or that the fees are the result of anything other than a well-functioning marketplace that appropriately values the quality content supplied via TV broadcast signals. For example, MVPDs contend that retransmission consent fees have increased over time, citing the Commission’s 2020 Communications Marketplace report as well as certain Kagan data.¹³⁷ Nothing cited by the MVPD commenters compares retransmission consent fees paid for stations/multicast streams/LPTVs in top four combinations versus other stations, however, making this data meaningless.

Claims about retransmission consent fees conveniently ignore the fact that the rates cable operators charge to subscribers increased well over the rate of inflation this past year and for many years previously, even before cable providers began paying any cash retransmission consent fees to broadcast stations.¹³⁸ The reality is that retransmission

¹³⁶ 47 U.S.C. § 325(b)(3)(C).

¹³⁷ NCTA Comments at 4 (citing 2020 Communications Marketplace Report at ¶ 215); ATVA Comments at 18-20.

¹³⁸ See *Communications Marketplace Report*, 36 FCC Rcd 2945, ¶ 234 (2020) (2020 Communications Marketplace Report) (reporting that the monthly price for basic cable and expanded basic cable services increased, respectively, 10.7% and 7.1% over the year

consent fees represent only a portion of MVPDs' overall programming fees, and they are not rising as fast as fees for other programming.¹³⁹ For example, recent Kagan data show that retransmission consent fees for 2021 are projected to increase only 2.5 percent from fees paid in 2020. In contrast, fees paid to regional sports networks are expected to increase 24.5 percent over the same period.¹⁴⁰ Kagan also projects that in 2021, broadcast's share of the total fees MVPDs pay for programming will be 21.0 percent, a 0.5 percent decline from 2020.¹⁴¹ Commission and industry reports also have found that the growth in retransmission consent fees has slowed in recent years,¹⁴² and project that those growth rates will decline considerably through 2023.¹⁴³

ending January 1, 2020, compared to an inflation rate of only 2.5%); Comments of NAB, MB Docket No. 15-216, at 3 & n. 2, 55 & n. 161 (Dec. 1, 2015) (discussing increases in cable consumer prices exceeding the rate of inflation over 20-year period 1995-2014, and explaining that those price increases began years before cable companies first started providing cash compensation to broadcasters around the mid-2000s). See also 2020 Communications Marketplace Report at Attachment E, p. 26 (showing rising prices of cable services from 1995 to 2020).

¹³⁹ See 2018 Quadrennial Replies at 67-70 (citing, *inter alia*, data showing that TV broadcasters earn less in fees than other video programmers, especially if measured on a per-viewer basis).

¹⁴⁰ S&P Group Global Market Intelligence, *Kagan Media Summit 2021 Industry Overview Part I: Spotlight on the US Broadcast Station Industry* (June 2021) (Kagan June 2021 Report).

¹⁴¹ *Id.*

¹⁴² 2020 Communications Marketplace Report at Attachment E, ¶ 34; *Communications Marketplace Report*, GN Docket Nos. 18-231, *et al.*, FCC 18-181, at ¶ 75, n. 191 (Dec. 26, 2018); see also 2018 Quadrennial Replies at 67 (citing Kagan reports of declines in the year-over-year growth rate in TV stations' retransmission revenues).

¹⁴³ Mike Farrell, *Virus Takes a Bite Out of Fee Growth*, Multichannel News (June 1, 2020) (citing MoffettNathanson's projection of a downturn in retrans fee growth rates). See also Nexstar Comments at 13-15 (discussing the acceleration of the existing cord-cutting trend during the pandemic and its impact on retransmission consent fees); NAB Supplemental Comments at 97-98 (discussing downward pressure on retransmission consent fees resulting from cord-cutting and the decline of pay TV subscribership).

Retransmission consent fees simply are not the cause of rising rates for MVPD service. But even if it were lawful for the Commission to regulate the prices, terms or conditions of retransmission consent, and even if the broadcast ownership rules were an appropriate vehicle for addressing MVPD claims about retransmission consent – neither of which are the case – changing the prices of inputs into MVPD services will not reduce retail prices for MVPD service.¹⁴⁴ The FCC cannot take pay TV providers at their word that they would charge less. Indeed, were the Commission to make any decisions based on the theory that consumers would benefit from reduced retransmission consent rates, it would concurrently need to require any reductions in programming fees to be reflected in pay TV bills.¹⁴⁵

¹⁴⁴ ATVA cites an article to support its contention that MVPDs will pass savings along to consumers. ATVA Comments at 19 and Exhibit C (citing E. Glen Weyl & Michal Fabinger, *Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition*, 121 J. Pol. Econ. 528 (2013), available at <https://www.jstor.org/stable/10.1086/670401>). Real world experience, however, demonstrates that MVPDs do not pass government-granted savings along to consumers or otherwise use such savings to benefit the public. See, e.g., Karl Bode, *AT&T Lied about Everything it Promised to Do if it Got a Tax Cut*, VICE (Jan. 30, 2020), available at: <https://www.vice.com/en/article/qjdvex/atandt-lied-about-everything-it-promised-to-do-if-it-got-a-tax-cut> (discussing how the Tax Cuts and Jobs Act of 2017 (TCJA) “provided an incredible windfall to AT&T and other giant corporations” with AT&T expected to net an estimated \$42 billion over ten years from reductions in the corporate tax rate. Unfortunately, “[l]ittle if any of that savings appears to have found its way to employees, customers, or the company’s network.”); Communications Workers of America, *AT&T 2018 Jobs Report* (Jan. 2019) at 1, available at: <https://cwa-union.org/sites/default/files/201901-att-offshoring-report.pdf> (three-quarters of AT&T’s 2018 profits went to shareholders in the form of dividends and share buybacks); Jim Tankersley, *Trump’s Tax Cut One Year Later: What Happened*, THE NEW YORK TIMES (Dec. 27, 2018), available at: <https://www.nytimes.com/2018/12/27/us/politics/trump-tax-cuts-jobs-act.html> (Verizon saved 1.75 billion in taxes in the first three quarters of 2018 as a result of the TCJA; it also cut 3,100 positions and announced 10,000 layoffs that year).

¹⁴⁵ Given the pay TV industry’s track record of charging consumers, schools and even governments for broadband, voice or video services that they do not receive, even direct regulation of their retail prices still may not make a difference. See, e.g., Dara Bitler, *200,000 Coloradans will get a check from CenturyLink after the company deceptively overcharged consumers*, KDVR (Jul. 29, 2021), available at:

MVPD commenters yet again point to data cited in the Commission's 2014 decision prohibiting joint negotiations among *separately owned* top four stations.¹⁴⁶ These very limited data have been repeatedly discredited and are insufficient to support an FCC decision that top four combinations involving full power stations, multicast streams, and/or LPTVs will materially impact retransmission consent fees. The data are now 11 years old, came from only three MVPDs, were not limited to commonly owned stations, were never independently verified and were not focused on top-four ranked stations but on Big Four network affiliates (which are not always ranked among the top four).¹⁴⁷ Pay TV providers

<https://kdvr.com/news/local/200000-coloradans-will-get-a-check-from-centurylink-after-the-company-deceptively-overcharged-consumers/>; Richard Cole, *More than 200,000 Colorado residents to get DIRECTV refund after settlement*, 9NEWS.COM (Jun. 4, 2021) available at: <https://www.9news.com/article/money/business/directv-refund-altitude-sports-colorado/73-c31a448e-54f9-497c-81ab-12ec8d9621a4>; Jon Brodtkin, *AT&T overcharged Washington, DC, for 5 years, must pay \$1.5 million*, AG Says, ARS TECHNICA (May 19, 2021), available at: [https://arstechnica.com/tech-policy/2021/05/att-overcharged-washington-dc-for-5-years-must-pay-1-5-million-ag-says/#:~:text=AT%26T%20overcharged%20the%20District%20of,General%20Karl%20Racine%20announced%20Monday.](https://arstechnica.com/tech-policy/2021/05/att-overcharged-washington-dc-for-5-years-must-pay-1-5-million-ag-says/#:~:text=AT%26T%20overcharged%20the%20District%20of,General%20Karl%20Racine%20announced%20Monday.;); Lily Flick, *AT&T, Verizon to pay University of California \$8.6M to settle whistleblower case*, THE DAILY BRUIN (Nov. 20, 2020), available at: <https://dailybruin.com/2020/11/10/att-verizon-to-pay-university-of-california-8-6m-to-settle-whistleblower-case>; Charlie Osborne, *Verizon, AT&T settle overcharging whistleblower case for \$116 million*, ZDNET (Sept. 25, 2020), available at: <https://www.zdnet.com/article/verizon-at-t-settle-overcharging-whistleblower-case-for-116-million/>; Kenneth Lovett, *Charter/Spectrum Cable agrees to record \$174M settlement for misleading customers on internet speed: AG's office*, NY DAILY NEWS (Dec. 18, 2018), available at: <https://www.nydailynews.com/news/politics/ny-pol-charter-spectrum-underwood-settlement-20181217-story.html>.

¹⁴⁶ NCTA Comments at 5 (citing *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, 3391 ¶ 16 n. 66. (2014) (2014 Retrans Order)); ATVA Comments at 9.

¹⁴⁷ As NAB previously explained, these data also were wildly inaccurate when submitted to the FCC in 2010. NAB 2018 Quadrennial Replies at 68-69. Only after NAB pointed out serious errors in the data (see, e.g., NAB Supplemental Comments, MB Docket No. 10-71, at 2-4 (May 29, 2013)) did the cable operators make a belated effort to correct their misleading FCC submissions. See Letter from Scott Ulsaker, Pioneer Long Distance Pioneer Telephone Cooperative to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (June 4,

have long complained about alleged harms from retransmission consent negotiations involving more than one Big Four affiliate (and/or top-four ranked station). If these combinations had any real impact on retransmission consent negotiations, MVPDs would be able to cite to something more than the same three outdated, unverified examples of higher rates (rates that may have resulted from a range of factors unrelated to top-four rank).¹⁴⁸

As they did in response to FCC's 2018 rulemaking notice, MVPD commenters cite certain Department of Justice (DOJ) filings as evidence that retransmission consent negotiations involving more than one major network affiliate will result in undue bargaining power or higher retransmission consent fees.¹⁴⁹ The DOJ filings cited by MVPD commenters are inapposite. First, because the DOJ has required/is requiring divestitures of the same-market stations and none of the proposed combinations have or will occur, there is no way to know whether MVPDs would have paid higher prices for retransmission consent as a

2010); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (Feb. 20, 2014) (correcting erroneous data from a 2010 *ex parte* notice); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (May 28, 2010) (erroneously including must carry stations in comparison); Letter from Stuart Gilbertson, USA Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (Feb. 24, 2014) (correcting erroneous data from a 2010 *ex parte* notice); Letter from Stuart Gilbertson, USA Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (May 28, 2010) (erroneously including must carry stations in comparison). Each of three (identically worded) cable operator letters supported ACA Connects comments filed a few weeks before the letters were filed. *Id.* At that time, ACA reported that it had more than 900 members. Comments of the American Cable Association, MB Docket No. 10-71, at 4 (May 18, 2010). If combinations/joint operations among top-four stations actually resulted in higher retransmission consent fees, it seems surprising that more ACA members did not submit substantial evidence to support ACA at that time or in the years since.

¹⁴⁸ NAB 2018 Quadrennial Replies at 68-69. Generalized statements that are not attributed to any specific MPVD or backed by declarations and documentation, such as ATVA's claim that its members report paying higher retransmission consent fees to broadcasters that have multicast or LPTV Big Four affiliations, should be accorded no weight in this proceeding. ATVA Comments at 17-18.

¹⁴⁹ ATVA Comments at 15-17; NCTA Comments at 3.

result of those combinations. Second, the proposed deals would have resulted in common ownership of more than one *full power television station* in the affected markets, not multiple affiliations involving multicast channels or LPTV stations. The DOJ never analyzed (nor purported to analyze) what, if any, competitive issues would arise from multicast or LPTV affiliations with more than one Big Four network. MVPD commenters' reliance on the DOJ's predictive judgments is misplaced and does not demonstrate that price increases have in the past or would in the future result from top four-ranked combinations of full power stations or multicast/LPTV Big Four affiliations.¹⁵⁰

B. The MVPD Industry Remains Highly Concentrated

MVPD commenters also continue to disregard their own status as the most highly concentrated segment of the video marketplace. For years, the pay TV industry has grown increasingly concentrated at the national, regional and local levels. Unlike broadcasters, MVPDs face no limitations on their ability to reach additional subscribers via their video, broadband or over-the-top (OTT) video services, nor any restrictions on their acquisition of or affiliation with programming networks or content.

¹⁵⁰ Relatedly, NCTA cites an investor presentation indicating that a television station group anticipates receiving additional retransmission consent fees following its proposed merger with another station group. NCTA Comments at 4-5. However, the two broadcasters involved in the proposed transaction do not operate in any of the same markets except one, and one of the parties has already divested its station in that market. See Gray Television, Inc., *Gray to Acquire Meredith Corporation's Local Media Group in a \$2.7 Billion Transaction*, Press Release (May 3, 2021) available at: <https://www.globenewswire.com/news-release/2021/05/03/2221446/0/en/GRAY-TO-ACQUIRE-MEREDITH-CORPORATION-S-LOCAL-MEDIA-GROUP-IN-A-2-7-BILLION-TRANSACTION.html>; TTVN Staff, *Allen Media Closes WJRT Acquisition from Gray*, TVNEWSCHECK (Sept. 23, 2021), available at: <https://tvnewscheck.com/business/article/allen-media-group-closes-wjrt-acquisition-from-gray/>. Thus, nothing about the proposed transaction could have any relevance to the top four prohibition.

Although pay TV providers face increased competition from OTT video services and have lost subscribers due to cord cutting, a majority of residential TV households still subscribed to a traditional MVPD service at the end of 2020.¹⁵¹ Measured by subscribers, the ten largest providers control a whopping 95.3 percent of the nationwide pay TV market and 88.4 percent of the nationwide broadband market; the top four providers control 80.4 percent of the pay TV market and 71 percent of the broadband market; and the top three control 68.5 percent of the pay TV market and 64.8 percent of the broadband market.¹⁵² And as NAB has discussed in multiple filings, the market capitalizations of many pay TV providers dwarf that of even large TV broadcast groups,¹⁵³ with such companies as TEGNA (\$3.84 billion) and Nexstar (\$6.09 billion) forced to punch above their weight class in negotiations with companies like Charter (\$144.86 billion) and Verizon (\$231.74 billion).¹⁵⁴

In addition to ignoring MVPDs' own competitive position and leverage, pay TV commenters continue to disregard broadcasters' competitive struggles in the current marketplace, even though the competition facing broadcasters is the primary focus of this proceeding and directly impacts broadcasters' position in retransmission negotiations. NAB, in contrast, has extensively documented the splintering of audiences, exponential growth in the amount, variety and quality of video programming, and an explosion of advertising competition, particularly from digital sources.¹⁵⁵ As NAB previously explained, fragmentation in the video programming marketplace, coupled with concentration among MVPDs, gives

¹⁵¹ Kagan, a media research group within S&P Global Market Intelligence (Q4 2020) (57.3 percent of households subscribed to MVPD service).

¹⁵² Kagan, a media research group within S&P Global Market Intelligence (Q4 2020).

¹⁵³ See, e.g., NAB Supplemental Comments at 25; NAB 2018 Quadrennial Replies at 26.

¹⁵⁴ NAB Supplemental Comments at 25.

¹⁵⁵ NAB Supplemental Comments at 55-61, 84-99.

pay TV providers “significant bargaining power” over video programmers, including local broadcast stations, whose advertising revenues depend on being available on as many distribution platforms and to as many viewers as possible.¹⁵⁶ In light of these facts, claims that MVPDs are struggling to negotiate retransmission consent with local broadcasters ring hollow.

C. ATVA’s Proposed Treatment of Multicast Streams and LPTV Stations as Full Power Stations Would Reduce the Quantity, Quality and Diversity of Programming Available to Local Television Viewers

ATVA again presents a list of markets where a broadcaster airs one of the four major networks on a full power station as well as either a multicast stream or an LPTV station for the apparent purpose of demonstrating that such affiliations should be restricted. In several of these markets, the alleged “problem” is that a station is airing multicast/LPTV programming affiliated with the same network as its primary programming stream, which does not appear to fit into ATVA’s theory of potential harm. In some of the markets, the “Big Four” programming is available on both a full power station and an LPTV or multicast station. Based on MVPDs’ past complaints that only one station in most markets is affiliated with a Big Four broadcast network, this would seem to be a positive development, rather than a problem for ATVA.

As it did in its 2019 comments, ATVA ignores the fact that in 52 Nielsen DMAs—nearly one-fourth of all markets in the country—there are fewer than four full power commercial television stations, making it impossible for the full complement of major

¹⁵⁶ See, e.g., NAB 2018 Quadrennial Replies at 66; Reply Comments of NAB, MB Docket No. 17-318, at 27 (Apr. 18, 2018) (citing David S. Evans, Chairman, Global Economics Group, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers*, White Paper, at 23-24 (Aug. 29, 2017)).

network affiliates to air on full power stations in every market.¹⁵⁷ Twelve markets have only one full power commercial television station, and in 20 markets, there are just two stations.¹⁵⁸ Thus, prohibiting a station from airing a second network's programming on a multicast stream would effectively deprive many local markets of the full range of major network programming, to the detriment of consumers. Most other markets where all four major network affiliates do not appear on full power stations have just 4-6 stations (39 markets).¹⁵⁹ As NAB explained in our previous filings, the Commission has acknowledged that independent, religious and in-language programming also may air on full power stations, and there is no public interest benefit in – let alone a lawful way to enact – a rule that would require this programming to be relegated to multicast streams or LPTV stations to favor the programming of Big Four networks.¹⁶⁰

In four of the markets where ATVA believes there should not be Big Four network affiliated programming on multicast or LPTV stations, one or more full power stations is affiliated with a Spanish language network such as Telemundo, Univision or UniMas, or airs independent Spanish language programming.¹⁶¹ In three of these markets, at least one of

¹⁵⁷ BIA Media Access Pro Database, September 2021. The BIA database NAB relied on in our initial comments continues to reflect the same 88 short markets (i.e., markets without a full complement of the four major network affiliates airing on full power television stations). NAB Supplemental Comments at 101 and Attachment L. Through additional research, NAB has identified additional short markets for a total of 95 markets.

¹⁵⁸ BIA Media Access Pro Database, September 2021.

¹⁵⁹ BIA Media Access Pro Database, September 2021.

¹⁶⁰ NAB Supplemental Comments at 101-104 (citing 2016 Ownership Order, 31 FCC Rcd at 9892; 2014 Quadrennial FNPRM, 29 FCC Rcd at 4400 n. 170).

¹⁶¹ NAB Supplemental Comments at 101-103 (there are three full-power Spanish language stations in the Harlingen-Weslaco-Brownsville-McAllen, TX, DMA (Univision, Telemundo, Independent), two full-power Spanish language stations in the Yuma AZ-El Centro, CA DMA (Univision and UniMas); a full-power Univision affiliate in the Monterey-Salinas, CA DMA; and

the Spanish language stations is ranked among the top four, so under the current rules, these are the stations that cannot combine with another top four-ranked station.¹⁶² As NAB explained in our initial comments, these affiliations are responsive to the particular demographics of the markets, which have high proportions of Hispanic viewers.¹⁶³ Another 17 full power stations across 15 markets cited by ATVA air religious or independent programming.¹⁶⁴ ATVA has not established that any public interest benefits would result from these networks and independent programmers – or any other non-“Big Four” programming¹⁶⁵ – being shifted from their current full power, primary stream homes to multicast streams or LPTV stations.

As NAB previously explained, MVPDs’ position that multicast and LPTV affiliations with the four major broadcast networks are a problem to be solved disregards multiple

two full-power Spanish language affiliations in the Santa Barbara-Santa Maria-San Luis Obispo, CA DMA (Univision and Telemundo)).

¹⁶² Nielsen May ’21, Live+SD, HHs, M-Su 9A-12A. In the Harlingen, TX DMA, the Univision affiliate is ranked number one, and the Telemundo affiliate is number two. *Id.*

¹⁶³ NAB Supplemental Comments at 102 (citing FCC, Office of Strategic Planning and Policy Analysis and Industry Analysis Division, Media Bureau, Hispanic Television Study, at 25 (May 2016), available at: <https://docs.fcc.gov/public/attachments/DOC-339345A1.pdf>).

¹⁶⁴ NAB Staff Analyses of BIA Media Access Pro Database, March 2021 and September 2021. The markets are Charleston-Huntington, WV; Springfield, MO; Chattanooga, TN; Cedar Rapids-Waterloo-Iowa City-Dubuque, IA; South Bend-Elkhart, IN; Tri-Cities, TN-VA; Ft. Wayne, IN; Macon, GA; Columbus-Tupelo-West Point, MS; Columbia-Jefferson City, MO; Duluth, MN-Superior, WI; Monroe, LA-El Dorado, AR; Panama City, FL; Bluefield-Beckley-Oak Hill, WV; and Cheyenne, WY-Scottsbluff, NE. NAB did not examine every market on ATVA’s list, but confined our review to markets where all four major network affiliates do not appear on full power TV stations.

¹⁶⁵ Full power stations are sometimes affiliated with networks other than the four major network affiliates, such as ION Media Network, the CW, MyNetworkTV, or MeTV. ATVA has not explained why such networks should only be permitted to launch on multicast streams or LPTV stations, or how it would serve the public interest to impede the growth and development of networks other than the “Big Four.”

Congressional actions¹⁶⁶ and prior Commission decisions emphasizing the value of multicast affiliations and the potential harms of bringing multicast streams or LPTVs within the scope of the local TV rule.¹⁶⁷ The public interest also would not be served by prohibiting top four combinations involving multicast streams or LPTV stations due to several practical implementation issues that would reduce broadcasters' flexibility to air programming relevant to the needs and interests of their communities and leave viewers with fewer and/or less attractive programming options. These implementation issues are beyond the FCC's control, and it is unclear whether or how the ramifications could even be addressed by broadcasters, networks and other programmers.

For example, under ATVA's proposal, if the licensee of a Big Four-affiliated full power television station and a Big Four-affiliated LPTV station were planning to assign or transfer this same-market combination to a new licensee, it would have to either divest one of the stations as part of the transaction or terminate the existing affiliation of one of the stations and secure other programming. This could cause the seller to violate the terms of its

¹⁶⁶ In the Satellite Television Extension and Localism Act of 2010 (STELA), Congress provided broadcasters with explicit incentives to use multicast streams and low power stations to ensure that short markets could receive the full complement of network programming. See Congressional Research Service, *How the Satellite Television Extension and Localism Act (STELA) Updated Copyright and Carriage Rules for the Retransmission of Broadcast Television Signals* at Summary, 1, 15-16 (Jan. 3, 2013) (STELA “[c]reated an incentive for broadcasters . . . to use their digital capabilities to offer multiple video streams (‘multicasting’) by requiring satellite operators to pay royalty fees for the programming on the non-primary, as well as primary, video streams”; STELA also gave broadcasters the incentive to use multicasting “to offer otherwise unprovided network programming in so-called ‘short markets’” by defining households as “served” if they can receive multicast signals, thereby prohibiting importation of distant signals to those households, and gave broadcasters incentives to use LPTV stations to air broadcast network programming).

¹⁶⁷ See, e.g., NAB 2018 Quadrennial Replies at 73-74; NAB 2018 Quadrennial Comments at 78-81; 2016 Ownership Order, 31 FCC Rcd at 9892 (citing 2014 Quadrennial FNPRM, 29 FCC Rcd at 4399-4400).

network affiliation and/or syndicated programming agreements, or at least force the seller into costly renegotiations with programmers to exit those agreements. Assuming the seller could terminate the relevant network affiliation agreements, the programming that had been airing on that station would simply disappear from the market, with no guarantee of returning. The Commission cannot control (or even predict) whether another licensee in the market would be willing or able to terminate its existing agreements with other networks or syndicators and take up the affiliation that was vacated by the seller. There are multiple business and other reasons why other stations in the market may be unable or unwilling to do so: it could be too costly to terminate existing programming deals; the prices, terms and/or conditions of carrying the displaced network could be unaffordable for other stations in the market; and/or other stations could be firmly committed to their existing independent, foreign language or religious formats because they believe that programming meets the needs of local viewers. If so, the affected market would suddenly return to being a “short” market without the full complement of major network affiliates, all as a result of Commission action.¹⁶⁸ Reducing the quality, quantity and diversity of programming available to local viewers, and restricting stations’ ability to select content that will be most valued by their local communities, will profoundly disserve the public interest.¹⁶⁹

¹⁶⁸ The displacement also would disrupt the marketplace, potentially harming both programmers and stations that have negotiated agreements in good faith. If popular Big-Four or non-Big Four network programming is no longer available at all, the programmers have strong incentives to place their programming on any permitted platform, and the price of the content may be artificially reduced by the disruption. Moreover, MVPDs that have negotiated for carriage of Big-Four programming on multicast/LPTV outlets or non-Big-Four programming on full power outlets, depending on the terms of their agreements, may suddenly find themselves carrying less desirable programming.

¹⁶⁹ Relatedly, as TEGNA observes, a rule that prevents a station from having more than one network affiliation is at odds with the FCC’s longstanding prohibition on stations entering into exclusive affiliation agreements. TEGNA Comments at 13 (citing 47 C.F.R. § 73.658(a))

D. Adoption of ATVA's Proposal Would Violate the Constitution and the Communications Act

Because ATVA's proposal would place the Commission in the position of regulating whether and how stations can carry certain content, adoption of the proposal also would contravene the Constitution and the Communications Act. As the Commission and courts have repeatedly held, regulation of a station's programming choices violates the First Amendment and Section 326 of the Communications Act. Both the First Amendment and Section 326 of the Act prohibit the Commission from engaging in censorship or dictating what programming stations air, with very few exceptions (e.g., political broadcasting, indecency and obscenity).¹⁷⁰ The Commission does not regulate the programming stations choose or which advertising they air, and has repeatedly declined to substitute its judgment concerning programming for that of the licensee.

("No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.")).

¹⁷⁰ Section 326 of the Communications Act prohibits censorship and expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. See also *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 650 (1994) ("the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."); *id.* at 651 ("[O]ur cases have recognized that Government regulation over the content of program broadcasting must be narrow, and that broadcast licensees must retain abundant discretion over programming choices."); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 126 (1973) (describing "the risk of an enlargement of Government control over the content of broadcast discussion of public issues" as a "problem of critical importance to broadcast regulation and the First Amendment"); *Network Programming Inquiry*, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960) (although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.").

Certain structural ownership rules have withstood First Amendment challenges in the past because those rules were not programming or content related.¹⁷¹ ATVA's proposal, however, would place the Commission in the position of dictating whether a broadcaster may elect to air the programming of one of the four major broadcast networks on the multicast streams of its full power station or on its LPTV station, and would potentially displace non-Big Four content such as independent, foreign language and religious programming from full power stations and require it to be located on secondary streams or LPTVs. By singling out and banning four specific sources of content, the regulation cannot be deemed merely structural, but would be a content-based regulation, subject to a higher standard of review. Content-based restrictions on broadcaster programming have been upheld by the Supreme Court only when the Court is "satisfied that the restriction is narrowly tailored to further a substantial governmental interest."¹⁷²

Even if ATVA's proposed rule was subjected to the same standard of review as the structural ownership rules that courts have upheld against past First Amendment challenges, ATVA's proposal would still fail. Structural ownership rules previously have been

¹⁷¹ See, e.g., *FCC v. Nat'l Citizens Comm. for B'casting*, 436 U.S. 775, 801 (1978) (upholding newspaper-broadcast cross-ownership ban against First Amendment challenge on grounds that "the regulations are not content related"); *Prometheus Radio Project*, 652 F.3d 431, 465 (3d Cir. 2011) (rejecting First Amendment challenge on grounds that the ownership rules apply "regardless of the content of the programming"); *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 169 (2002) ("we hold that as a structural rule, the Local Ownership Order is consistent with the First Amendment").

¹⁷² See, e.g., *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378-380, 398 (1984) (striking down ban on editorializing by noncommercial broadcast stations because "the restriction [was] not crafted with sufficient precision to remedy those dangers that may exist to justify the significant abridgment of speech worked by the provision's broad ban on editorializing") (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 396-97 (1981) (upholding reasonable access political advertising statute on grounds that it "does not impair the discretion of broadcasters" to "carry any particular type of programming"); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-11 (1973)).

upheld based on a finding that the rules were “rationally related to substantial government interests in promoting competition and protecting viewpoint diversity.”¹⁷³ Adoption of ATVA’s proposal would never meet this standard of review (much less the more rigorous standard for content-related regulation), due to the lack of evidence it would promote *any* public interest objective. Assuming MVPDs could demonstrate that negotiations involving multicast streams affiliated with a major broadcast network resulted in higher retransmission consent fees (which they have not yet come close to doing), reducing the costs of pay TV inputs, whether programming or bucket trucks, is not a substantial government interest. And even if the Commission were to contend it has a substantial interest in reducing consumer bills for MVPD service, ATVA’s rule certainly would not be “narrowly tailored” nor even “rationally related” to that outcome, because there is no guarantee – or even a likelihood – that any cost savings would actually be passed on to consumers, rather than used to line the pockets of the pay TV industry.¹⁷⁴ NAB urges the Commission to avoid the constitutional issues raised by the programming and content-related regulations proposed by ATVA.

The FCC also lacks statutory authority to dictate what content/programming a broadcast licensee can or cannot carry.¹⁷⁵ As the D.C. Circuit Court of Appeals observed, “Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content.”¹⁷⁶ Accordingly, the Court

¹⁷³ *Prometheus Radio Project*, 652 F.3d at 464.

¹⁷⁴ See *supra*, Section VI.A. and notes 144-145.

¹⁷⁵ See, e.g., *Motion Picture Assn. of Am., Inc. v. FCC*, 309 F.3d 796, 802-07 (D.C. Cir. 2002) (*MPAA v. FCC*); 47 U.S.C. § 326; *Turner*, 512 U.S. at 650.

¹⁷⁶ *MPAA v. FCC*, 309 F.3d at 805 (providing examples, including 18 U.S.C. § 1464, regulating obscenity and indecency via radio communications and 47 U.S.C. § 315, governing provision of broadcast time to candidates for public office).

concluded that the Commission could not rely on such general provisions as Section 1, 47 U.S.C. § 151, Section 4(i), 47 U.S.C. § 154(i), or Section 303(r), 47 U.S.C. § 303(r), of the Communications Act as a source of statutory authority to regulate programming.¹⁷⁷ Because the FCC cannot rely on its general authority to regulate program content, and because Congress clearly has not authorized the regulation of program content in the specific context of multiple ownership, the Commission lacks statutory authority to adopt ATVA's local TV rule proposal, which "significantly implicat[es] program content."

E. Commenters Concerned about Sharing Arrangements Fail to Demonstrate that Existing Laws and Rules Governing Such Arrangements Are Inadequate

Some commenters express concerns about broadcasters that engage in arrangements such as local marketing agreements, joint sales agreements and shared services agreements.¹⁷⁸ While NAB cannot address the terms of specific arrangements among broadcasters, the Communications Act and Commission rules clearly prohibit unauthorized transfers of control, and the Commission has the authority to enforce these requirements.¹⁷⁹ There are legal standards that apply to these arrangements that can be found in the FCC's rules and decisions.¹⁸⁰ Many of the arrangements are specifically reviewed as part of FCC review of license assignments or transfers of control. If there are

¹⁷⁷ *MPAA v. FCC*, 309 F.3d at 805-07.

¹⁷⁸ ATVA Comments at 21-24; Free Press Comments at 9-20.

¹⁷⁹ 47 U.S.C. § 310(d). *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142-46 (1995) (*WGPR*), *vacated on other grounds sub nom. Serafyn v. FCC*, 149 F.3d 1213, 331 U.S. App. D.C. 340 (D.C. Cir. 1998); *Choctaw Broad. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8538-39 (1997).

¹⁸⁰ *Id.* See also 47 C.F.R. § 73.3555, note 2.j.2. (attributing time brokerage agreements involving more than 15 percent of broadcast time); 47 C.F.R. § 73.3526(e)(14), (16), and (18) (requiring stations to place time brokerage agreements, joint sales agreements, and shared services agreements in their online public files).

compliance issues raised by any agreement, the Commission has multiple tools at its disposal for addressing such issues. Commenters have failed to demonstrate that existing law governing sharing arrangements and licensee obligations to maintain control of the programming, personnel and finances of their stations is failing to work as intended.

* * *

Even if the FCC's ownership rules were designed to safeguard MVPDs from paying higher retransmission consent fees than they want (*i.e.*, \$0.00), MVPDs have not shown any relationship between top four station combinations or multicast/LPTV network affiliations and retransmission consent fees, or offered any evidence that broadcasters have such undue market power they can extract supracompetitive fees from large pay TV/broadband providers. They have presented no evidence supporting the FCC's retention of the top four prohibition, and certainly no rationale for a more restrictive rule based on Big Four network affiliation and the content stations carry on their multicast streams or LPTV stations. Such a rule would violate the Administrative Procedure Act, Section 202(h), Section 326, and the Constitution. Given the extensive record evidence of competition for audiences and advertising dollars faced by local broadcasters, which remains uncontroverted by pay TV interests or other commenters, Section 202(h) requires modernization of the local TV ownership rule as NAB has urged.¹⁸¹

¹⁸¹ See NAB Supplemental Comments at 84-89; NAB 2018 Quadrennial Comments at 43-54. For all the reasons set forth in this proceeding, the FCC should no longer retain the *per se* restrictions that ban combinations among top four rated TV stations, regardless of their audience or advertising shares, and that prevent ownership of more than two stations in any of the 210 DMAs, regardless of the stations' competitive position and the characteristics of their local markets. This across-the-board approach irrationally ignores actual competitive conditions in disparate markets. And as NAB previously explained in detail, it is a myth that top four stations in all-sized markets occupy positions of competitive power.

VII. THE RECORD DEMONSTRATES THE INCREASINGLY SERIOUS ECONOMIC STRUGGLES OF FM AND AM STATIONS AND THE URGENT NEED TO REFORM THE ANALOG-ERA LOCAL RADIO CAPS

In its comments, NAB provided updated information and data detailing the continuing digital transformation of the media and advertising markets and how it has splintered radio stations' audiences, harmed their ability to attract adequate ad revenues and undermined the competitiveness of many stations, especially those in smaller markets.¹⁸² We also showed overwhelming support among radio broadcasters, including many small broadcasters and those with stations in smaller markets, for reform of the local radio caps generally and for NAB's proposals specifically.¹⁸³ Several commenters opposing reform of the existing radio (or TV) limits merely repeated their calls for no changes to the rules, without providing any updated information or empirical data about the competitive position of broadcast stations and without addressing important marketplace developments, such as the effect of the pandemic and recession on media consumption and the advertising market.¹⁸⁴ The Commission should give little weight to comments that neglected to address the FCC's questions raised in the Public Notice and, more importantly, failed "to address meaningfully," or, indeed, at all, the competitive "question that Congress required [the FCC] to answer" in Section 202(h).¹⁸⁵

In contrast, ten commenters submitted joint comments providing extensive updated information and data about the intensifying competition radio stations face for audiences

¹⁸² NAB Supplemental Comments at 68-84 and Attachments C, F & G.

¹⁸³ *Id.* at 82-84.

¹⁸⁴ See, e.g., UCC Comments at 2; Free Press Comments at 6; MMTC Further Comments at 2; NABOB Comments at 12.

¹⁸⁵ *Fox*, 280 F.3d at 1044 (finding FCC's analysis of competition in the TV industry "woefully inadequate").

and advertising revenue and the harms that existing regulations cause to local stations' ability to compete, and, thus, to serve their local communities.¹⁸⁶ The Joint Commenters provided detailed listening data from Edison Research, which documented, consistent with NAB's comments, significant decreases in the amount of time Americans spend listening to AM/FM radio.¹⁸⁷ While the COVID-19 pandemic and changes in commuting patterns clearly have affected audio listening patterns, the Joint Comments show, consistent with NAB's comments, that the pandemic has merely accelerated pre-existing trends in audio (and video) consumption and that consumers' habits accrued during the pandemic will largely endure.¹⁸⁸ The Joint commenters also submitted a report from Borrell Associates providing updated data and analysis on the advertising market, which shows, yet again consistent with

¹⁸⁶ Comments of Connoisseur Media, LLC, Mid-West Family Broad., Frandsen Family Stations, Neuhoff Commc'n, Patrick Commc'n, LLC, Townsquare Media, Inc., Midwest Commc'n, Inc., Cherry Creek Media, Eagle Commc'n, Inc., and Legend Commc'n, LLC (collectively, the Joint Commenters), MB Docket No. 18-349 (Sept. 2, 2021) (2021 Joint Comments).

¹⁸⁷ See *id.* at Exhibit A. For Americans overall, the average daily listening to AM/FM over-the-air (OTA) broadcasts fell 15 percent just from 2019 to 2021, with a drop of nearly 40 percent from 2014 to 2021. This trend is even more striking among young Americans, with the daily time people ages 13-24 spent listening to AM/FM over-the-air broadcasts falling 34 percent from 2019 to 2021, and nearly 60 percent from 2014 to 2021. *Id.* at 1. See also NAB Supplemental Comments at 74-75 and Attachment F (providing data on AM/FM listening, counting both OTA and streaming). In just five years, AM/FM radio's share of total daily listening time among those 13+, counting both OTA and online listening to radio streams, fell by 22.6 percent. Edison Share of Ear®, Q4 2015-Q4 2020.

¹⁸⁸ See 2021 Joint Comments at Exhibit A. In presenting the AM/FM listening data described in the footnote immediately above, Larry Rosin, the President of Edison Research, stated that the changes evident in Edison's Share of Ear® data since 2019 "are consistent with the trend of the changes in prior years," and that Edison did "not believe that they are pandemic related, but instead that they are likely to persist into the future absent some significant change in the audio marketplace." *Id.* at 1 (also stating that AM/FM OTA listening has decreased every year since 2014, when Edison began conducting its Share of Ear® survey). Accord NAB Supplemental Comments at 64-67, 74-75.

NAB's comments, continued erosion of broadcasters' share of local advertising due to the still increasing competitive presence of the large technology platforms.¹⁸⁹

Perhaps most significantly, the Joint Commenters agreed with NAB that the competitive and financial challenges facing AM and FM radio stations, particularly in smaller markets, endangers the public's OTA radio service. Aside from losing nearly 200 radio stations in the past two years, growing numbers of stations are unprofitable and experiencing negative advertising growth, while at the same time are constrained by outdated ownership restrictions from responding to these competitive conditions.¹⁹⁰ The managing director of a nationally-known media brokerage firm stated in a declaration that there are increasingly no buyers for struggling AM and FM stations, especially in mid-sized

¹⁸⁹ See 2021 Joint Comments at Exhibit B. This report by Gordon Borrell, CEO of Borrell Associates, estimated that at the end of 2020, digital media's share of all local advertising had grown to 63 percent (with much of that going to Google, Facebook and Amazon), and projected digital's share of the local ad market to reach 72 percent by 2025, as radio (and TV) local ad shares continue to decline. Exh. B at 2-3, 4-5. Based on its research and surveys of advertising buyers, the Borrell report concluded that "local advertisers see radio and digital advertising as substitutes," as they "shift[] dollars back and forth between these media." *Id.* at 4. Interestingly, Borrell noted that local outlets, including radio, have offered niche or hyperlocal products, mostly digital, to better compete, and that, while traditional media's digital ad sales have grown, they have not kept pace with the rate at which local businesses have increased their digital spending (*i.e.*, more digital advertising has gone outside local markets to pureplay internet companies). *Id.* at 2, 6-7. The Joint Commenters previously explained that allowing broadcasters to increase their scale will provide station owners with the resources to offer new or expand existing localized digital ad products and to offer those products in more markets, including smaller ones. See Joint Comments of Connoisseur Media, LLC, *et al.*, MB Docket No. 18-349, at 21-22, 24-25 (Apr. 29, 2019); see also *id.* at Exh. C (declarations of station owners and executives); NAB Supplemental Comments at 81-82 and notes 270, 272. While increased local scale will not allow radio station groups to compete with digital ad platforms nationally, the additional scale and resources from reforming the local radio caps would permit station groups to better compete for ad revenue within their local markets, against traditional media and digital platforms. Borrell's report showed that a number of radio groups now earn very significant portions of their gross ad revenues from digital advertising. 2021 Joint Comments, Exh. B at 8.

¹⁹⁰ See 2021 Joint Comments at 26-27.

and small markets, other than a same-market competitor who often may not be allowed to purchase the troubled stations due to the local radio caps.¹⁹¹ As a result, more stations, both AM and FM, are unable to maintain a significant local presence and offer a high level of local services, and their owners are both financially unable to improve their stations or sell them to a competitively viable local broadcaster capable of upgrading the underperforming outlets by leveraging scale economies.¹⁹²

In light of these competitive conditions and the record evidence, Section 202(h) requires the Commission to relax or repeal its local radio limits for both FM and AM stations. NAB has submitted unrefuted evidence demonstrating the increasing parlous financial position of the radio industry, which directly and negatively impacts stations' ability to hire additional or even retain existing staff; upgrade their facilities; and maintain, let alone improve, their programming, including locally-oriented content. Local radio stations' OTA ad revenues fell 44.9 percent in nominal terms (\$17.6 billion to \$9.7 billion) from 2005-2020, and even when taking stations' 2020 digital ad revenues into account, their total ad revenues still dropped 39.8 percent in nominal terms (\$17.6 to \$10.6 billion) over that time period.¹⁹³ Analysts expect only a very modest recovery from the pandemic recession, with

¹⁹¹ *Id.* at 27 and Exhibit C, Declaration of W. Lawrence Patrick at ¶¶ 5, 8. There is also a lack of marketplace demand for new FM construction permits (CPs). In the auction of four AM and 135 FM CPs concluded in August, 30.2 percent went unsold. Similarly, in the five full-power FM auctions prior to the most recent one, nearly one-quarter of the FM CPs on offer went unsold. See NAB Supplemental Comments at 15 and notes 33-34.

¹⁹² See 2021 Joint Comments at 27-29 and Exhibit C at ¶¶ 8-12 (giving specific examples). This updated information is consistent with BIA's 2019 study on radio stations' competitive challenges in the current marketplace. See BIA Advisory Services, *Local Radio Station Viability in the New Media Marketplace*, at 1-3, 31-36 (Apr. 19, 2019) (BIA Radio Study), Attachment A, NAB 2018 Quadrennial Comments.

¹⁹³ NAB Supplemental Comments at 77, note 252 and Attachment G.

stations' projected OTA ad revenues in 2025 rebounding only to \$10.8 billion, 38.6 percent lower than they were in 2005 (even without accounting for inflation).¹⁹⁴

The advertising revenues of FM stations mirror the radio industry as a whole, with FM stations' revenues over the same 2005-2020 period showing a similarly stark decline.

According to BIA data, the OTA ad revenues of FM stations in the 253 continuously surveyed Arbitron/Nielsen Audio markets fell from \$10.5 billion in 2005 to \$6.0 billion in 2020, a decline of 42.9 percent in nominal terms.¹⁹⁵ These revenue data show a clear and present threat to FM stations' "ability to serve the public interest in the spirit of the Communications Act."¹⁹⁶

Moreover, it is not only AM stations that have experienced declines in listenership.¹⁹⁷ According to Nielsen Audio, the Average Quarter Hour (AQH) Listening of FM stations dropped 23.5 percent in just the past five years.¹⁹⁸ Falling AQH audiences directly impact

¹⁹⁴ *Id.* at 77 and Attachment G. Taking projected digital revenues into account, BIA Advisory Services expects total radio ad revenues in 2025 to reach \$12.3 billion, representing a 30.1 percent nominal decline from 2005. *Id.* at note 253.

¹⁹⁵ Attachment A, *Nominal and Real Local FM Station Revenue in 253 Nielsen Audio Radio Markets*. As NAB previously explained, however, examining revenues over time without taking inflation into account is misleading because inflation is often a significant component of apparent growth (or non-growth) in any series measured in dollars. NAB Supplemental Comments at 95. Over the 20-year period 2000-2020, FM stations' real OTA ad revenues, measured in year 2000 dollars, declined 60 percent (and that revenue had declined 47 percent in real terms from 2000-2019, *i.e.*, prior to the pandemic recession). See Attachment A.

¹⁹⁶ *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992) (relaxing local radio rules).

¹⁹⁷ See, e.g., *All-Digital AM Broadcasting*, Notice of Proposed Rulemaking, 34 FCC Rcd 11560 (2019) (stating that the AM service has struggled for decades with declining listenership).

¹⁹⁸ Nielsen Audio, RADAR Nat'l Survey Estimates, FM AQH Totals, Monday-Sunday 6:00 AM-12:00 Midnight, persons 12+ (surveys released Sept. 2016-Sept. 2021 showing that FM stations' AQH audiences fell from 20.597 million to 15.765 million).

the competitive and financial viability of FM (and AM) stations because advertising is sold based on stations' AQH listening, rather than stations' audience reach or weekly come. AQH audience metrics are accordingly much more relevant for the FCC's competition analysis in this proceeding than any measure of radio stations' cumulative reach.¹⁹⁹

The two major metrics of competitive health for radio stations – advertising revenue and audience size/listening – thus show that the FM service faces formidable challenges in today's advertising market and in the modern audio marketplace, which, as the Commission previously concluded, includes online audio and satellite radio providers, as well as terrestrial radio stations.²⁰⁰ These FM advertising and audience data also reconfirm that radio stations compete in a broader market, beyond just other terrestrial radio stations. After all, given the widely recognized competitive and technical difficulties experienced by AM stations,²⁰¹ it cannot be competition from the AM service causing the significant decline in the FM service's revenues and audiences. Rather, FM stations' competitive struggles stem, as NAB and other radio broadcasters have demonstrated, from competing in a broad advertising market that includes digital platforms (as well as other traditional media) and in

¹⁹⁹ See Reply Comments of NAB, GN Docket No. 20-60, at 17-18 (May 28, 2020). As NAB explained last year, pointing to the weekly reach of radio has little relevance to analyzing local stations' ability to attract audiences in a fragmented content market and to convert those audiences to advertising revenue. Given that persons are counted as being "reached" by radio so long as they listened for as little as five minutes per week, it is unsurprising that radio advertising is not sold on the basis of weekly cumulative reach. *Id.* The BIA Radio Study (at 5) previously documented that radio stations' nationwide AQH full day audiences declined 30.3 percent from 2003 to 2018.

²⁰⁰ *2020 Communications Marketplace Report*, 36 FCC Rcd 2945, 3086-87 (2020).

²⁰¹ See, e.g., *Revitalization of the AM Radio Service*, Notice of Proposed Rulemaking, 28 FCC Rcd 15221, 15222-23 (2013).

an audio marketplace that includes other audio content providers, especially online.²⁰² Accordingly, it would be arbitrary and capricious under the Administrative Procedure Act, inconsistent with Section 202(h), and contrary to the public's interest in a competitively vibrant free OTA radio service to retain the existing local radio caps or to provide needed regulatory relief only to AM stations.²⁰³

For all these reasons, NAB again asks the Commission to adopt our proposal for reforming the local radio rules.²⁰⁴ NAB's proposal takes account of the tenuous competitive position of the radio industry overall in the modern digital marketplace;²⁰⁵ the special challenges facing AM radio;²⁰⁶ and the struggles of all stations, including FM, to earn adequate advertising revenues to support quality local services including news, sports and

²⁰² See, e.g., 2021 Joint Comments at Exhibit B, 2-10 (explaining how national digital ad platforms compete in, and take large amounts of ad revenue away from, local markets, to the detriment of local radio stations and other local ad-supported outlets, including broadcast TV); *id.* at Exhibit A at 1, 12 (explaining that, as the amount of time spent listening to AM/FM radio over-the-air decreased from 2014-2021, there was a "corresponding increase in listening to audio streaming services," and documenting a 69 percent increase in daily time spent listening to all audio streaming sources since 2014).

²⁰³ See NAB 2018 Quadrennial Replies at 49-54 (explaining why the FCC would have no basis for failing to provide regulatory relief to both FM and AM stations).

²⁰⁴ Under our proposal: (1) in Nielsen Audio Markets 1-75, a single entity could own up to eight commercial FM stations, with no cap on AM ownership; and (2) in Nielsen markets outside of the top 75 and in unrated areas, there would be no restrictions on the number of commercial FM or AM stations a single entity could own. To promote new entry into broadcasting, an owner in the top 75 markets would be permitted to own up to two additional FNM stations (for a total of 10 FMs) by successfully participating in the FCC's incubator program.

²⁰⁵ See, e.g., NAB Supplemental Comments at 68-84, Attachments F and G; NAB 2018 Quadrennial Comments at 7-28; BIA Radio Study at 3-13; Comments of NAB, GN Docket No. 20-60, at 5-27 (Apr. 27, 2020).

²⁰⁶ See, e.g., NAB 2018 Quadrennial Comments at 34-35; BIA Radio Study at 15-18, 34.

emergency journalism, especially in mid-sized and small markets and in unrated areas.²⁰⁷

The record in this proceeding supports NAB's proposal designed to address the competitive challenges of the entire radio industry by providing maximum regulatory relief to AM radio and meaningful relief to FM radio. In short, FCC adoption of NAB's proposal would fulfill Section 202(h)'s mandate and Congress's even longer-standing goal of promoting a competitively viable radio service capable of effectively serving local communities in all-sized markets.

VIII. CONCLUSION

The record in this proceeding presents a compelling case for reforming the local radio and TV rules in light of profound competitive changes in the media and advertising markets. As NAB has demonstrated, the retention of asymmetric, analog-era restrictions on broadcast stations alone will not promote successful new entry into the broadcast industry and will disserve the FCC's competition and localism goals, especially in mid-sized and small markets where the viability of local broadcast news operations and even the financial survival of many stations are in doubt. NAB and various broadcasters have provided the Commission with extensive information, data and studies showing the growing struggles of FM, AM and TV stations to earn vital revenues necessary to support their operations and serve their communities effectively. The Commission should summarily reject the self-

²⁰⁷ See, e.g., NAB Supplemental Comments at 31-34, 75-84 and Attachment C; NAB 2018 Quadrennial Comments at 31-33; BIA Radio Study at 14, 31-35. NAB's proposal also would address the competitive concerns of Class A FM broadcasting. See Comments of Press Commc'n, LLC, MB Docket No. 18-349, at 2-5 (Aug. 30, 2021) (calling for reform of the local radio rules because the competitive playing field is now so lopsided that radio broadcasting generally, and Class A FM broadcasting specifically, "cannot readily compete in the marketplace and make a profit").

interested arguments of broadcasters' pay-TV competitors for retaining, or even tightening, ownership restrictions that keep local TV stations in uncompetitive ownership structures.

Instead, the Commission must now fulfill congressional intent and its obligations under Section 202(h). NAB urges the FCC to timely conclude the 2018 quadrennial by modernizing its local radio and TV rules to “keep pace with the competitive changes in the marketplace”²⁰⁸ and “to continue the process of deregulation” that Congress began and envisioned in the 1996 Act.²⁰⁹

Respectfully submitted,

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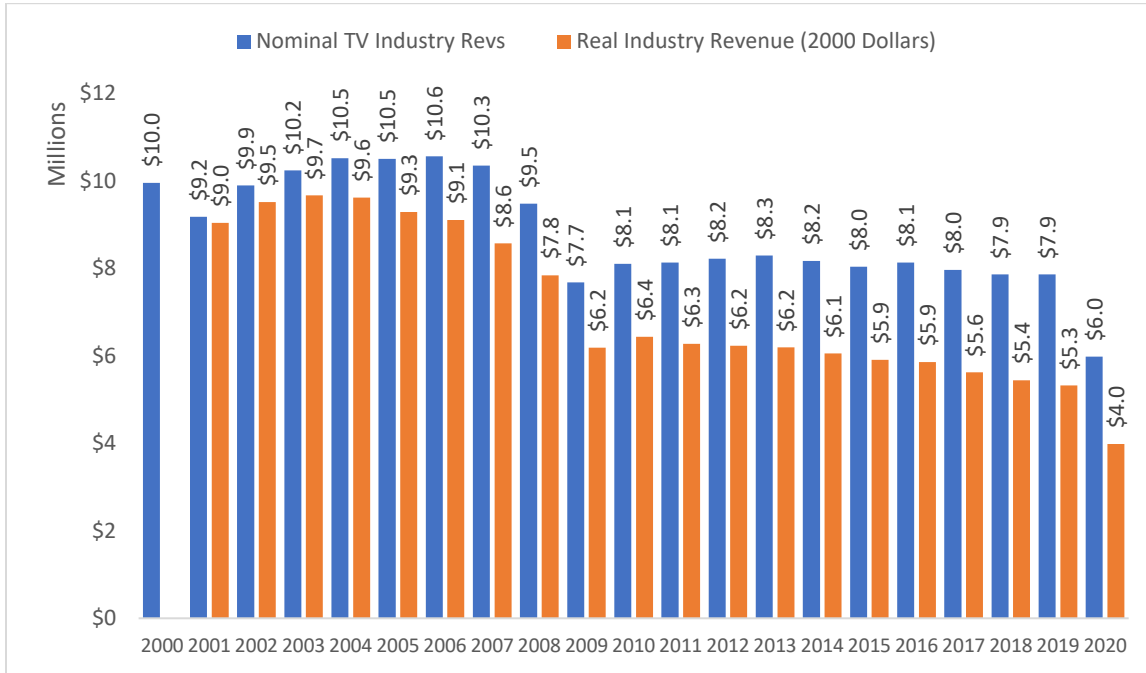
October 1, 2021

²⁰⁸ *Prometheus*, 824 F.3d at 50.

²⁰⁹ *Fox*, 280 F.3d at 1033 (also stating that “Congress set in motion a process to deregulate the structure” of the broadcast industry in the 1996 Act).

Attachment A

Nominal and Real Local FM Station Revenue in 253 Nielsen Audio Radio Markets



Source: BIA Advisory Services, LLC