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

In the Matter of	)	
	)	
2020 Communications Marketplace Report	)	GN Docket No. 20-60
	)	
	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

Based on the National Association of Broadcasters' comments in this proceeding,[1] and on the comments and studies submitted by NAB and myriad broadcasters in the pending quadrennial ownership review, the FCC's upcoming Communications Marketplace Report (Report) should reflect the proliferation of audio and video content providers and digital advertising platforms and the vast array of options now available to both consumers and advertisers.[2] The few parties commenting here on audio and video issues either do not convincingly dispute or do not bother to address the profound competitive impact that the transformation of the media and advertising markets in the digital age has had on local broadcast stations.

[1] Comments of NAB, MB Docket No. 20-60 (Apr. 27, 2020) (NAB Comments). 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.

[2] FCC, *Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, Public Notice, GN Docket No. 20-60, DA 20-199 (Feb. 27, 2020).

More specifically, the Commission should give no credence to certain music industry parties who, while purporting to address competition in the audio marketplace, failed to analyze the current advertising market and the radio industry's place in it. Indeed, these parties failed even to acknowledge that radio stations' competitive viability – and thus their ability to serve the public interest effectively – are dependent on competing successfully against a range of traditional media outlets and digital platforms for advertising dollars,

As NAB also discusses herein, the Report should not repeat music industry talking points from a congressional debate over copyright policy merely because the music industry dislikes certain copyright laws outside the FCC's purview. The Commission further must reject the erroneous argument that Congress's long-standing and recently reaffirmed refusal to accede to the music industry's repeated demands for changes to copyright law somehow means the FCC should retain outdated local radio ownership rules, irrespective of the competitive transformation of the communications marketplace.

Likewise, the predictable and unmeritorious complaints of the multichannel video programming distributor (MVPD) parties about retransmission consent – complaints that have not improved with age and repetition – do little to inform the FCC's inquiries here and have no bearing on the need to reform the local TV ownership rule. As NAB has explained innumerable times, MVPDs' unhappiness about paying retransmission consent fees does not mean that TV broadcasters have any undue bargaining power over MVPDs; that those fees are, in any economic sense, too high; or that changes to FCC rules intended to enhance large pay-TV/broadband companies' position at the negotiating table are in any way justified.

Indeed, NAB reemphasizes that the coronavirus pandemic's massive blow to the advertising market and the revenues of local radio and TV stations – especially those in mid-sized and small communities – makes modernizing the FCC's analog-era ownership rules more important and urgent than ever. The crisis has reconfirmed the importance of TV and radio stations as sources of news, information and entertainment and the need to ensure that broadcasters may form competitively viable ownership structures enabling their continued service to local communities.

II. BASED ON THE RECORD HERE AND IN OTHER RECENT PROCEEDINGS, THE FCC MUST CONCLUDE THAT AM/FM STATIONS COMPETE AGAINST MYRIAD OTHER MEDIA OUTLETS AND ADVERTISING PLATFORMS IN TODAY'S DIGITAL COMMUNICATIONS MARKETPLACE

Music industry commenters in this proceeding[3] present no evidence challenging broadcasters' data and evidence in this and other FCC proceedings establishing that terrestrial radio stations compete against an array of content providers and advertising platforms for both audiences and vital ad dollars. Thus, as explained in detail below, the Coalitions' comments offer little to usefully inform a report on competition in today's communications marketplace.

A. Commenting Parties That Ignore the Most Salient Facts About AM/FM Radio and Its Competitive Position Offer Little to Inform the FCC's Report

The Coalitions ignore the most fundamental fact about terrestrial radio and its position in the marketplace – that AM/FM radio stations offer a free, over-the-air (OTA) service and depend almost solely on advertising revenues to survive, let alone serve their local communities effectively. As a result, the Coalitions' discussions of competition and the public interest are wholly inadequate. Their comments do not recognize the radio industry's

[3] Comments of musicFIRST Coalition and Future of Music Coalition (Coalitions), MB Docket No. 20-60 (Apr. 27, 2020) (Coalition Comments).

well-documented, steady decline in advertising revenue;[4] digital platforms' very significant diversion of vital ad revenues away from OTA radio at the same time that growth slowed in the overall ad market;[5] and the recent collapse of the ad market due to the coronavirus pandemic, which is devastating to non-subscription media, including broadcast stations.[6]

In fact, the ad market has only worsened since NAB submitted initial comments in this proceeding, On April 29, the Interactive Advertising Bureau (IAB) released the results of a second survey of ad buyers, which found that the percentage of buyers adjusting or pausing their advertising had risen to 82 percent, up from 70 percent in its March survey. Notably, this increase resulted from more media buyers reporting that they had paused their advertising entirely.[7] Another analysis of the advertising market recently reported that ad demand fell 35 percent year-over-year in April, following substantial declines in March.[8]

The radio industry has been especially hard hit because, as NAB previously explained,[9] the "lion's share" of stations' ad revenues "comes from local businesses – the

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[4] NAB Comments at 18-19 & Figure, "FM Radio Stations Over-the-Air Advertising Revenues"; BIA Advisory Services, *Local Radio Station Viability in the New Media Marketplace*, at 10-11 & Figure 7, "Local Radio Stations Over-The-Air Advertising Revenue" (Apr. 19, 2019) (BIA Radio Study), Attachment A to Comments of NAB, MB Docket No. 18-349 (Apr. 29, 2019) (NAB 2018 Quadrennial Comments).

[5] NAB Comments at 16-17, 19-23; Reply Comments of NAB, MB Docket No. 18-349, at 37-41 (May 29, 2019) (NAB 2018 Quadrennial Reply Comments); NAB 2018 Quadrennial Comments at 20-25; BIA Radio Study at 11-13.

[6] NAB Comments at 4, 17, 23-25, 40-41.

[7] IAB, *Coronavirus Ad Spend Impact*: *Brands*, *Agencies & Other Buyers* (Apr. 29, 2020). In its survey conducted April 15-21, IAB reported that 37 percent of ad buyers said they had paused their advertising entirely, up from 24 percent of ad buyers in its March survey.

[8] Joe Mandese*, U.S. Ad Market Plummets 35% In April, Second Consecutive Month Of Faltering Demand*, MediaPost (May 21, 2020).

[9] *See* NAB Comments at 25 & note 101 (reporting that 75-80 percent or more of radio stations' ad revenues are attributable to local businesses).

mom-and-pop auto dealers, mattress stores and even attorneys who have scaled back amid the mass shutdowns."[10] When ad dollars are cut, radio stations feel the impact immediately, and those are revenues that stations will never be able to recoup, as air time cannot be resold after-the-fact.[11] According to Radio Ink's daily coronavirus update, radio company CEOs have been reporting revenue drops anywhere between 40 to 70 percent.[12]

Unsurprisingly, numerous radio broadcasters of all sizes have been forced to lay off or furlough employees, reduce salaries or even go silent,[13] and these trends have worsened over time. A "record number of radio stations signed off" the air in April, according to data from Precision Trak/Inside Radio.[14] The Coalitions unsurprisingly took no notice of the massive harms inflicted on local radio stations, including diverse and small broadcasters, by the unprecedented plunge in the advertising market, despite their supposed concern about independent broadcasters and diversity in broadcasting.[15]

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[10] Ted Johnson, *Local Media Outlets to D.C. Lawmakers*: *Consumers Are Leaning On Us During Coronavirus Crisis*, *But We Need A Lifeline*, Deadline (Apr. 28, 2020).

[11] *Id*. (citing Ron Stone, president/CEO of Adams Radio, which owns stations in five markets). Mr. Stone reported that Adams Radio lost about 65 percent of its business in April.

[12] Radio Ink, *Just How Bad Is The Ad Revenue Decline?* (May 7, 2020).

[13] *See* NAB Comments at 23-24 & notes 94-95.

[14] Inside Radio*, April Saw A Big Spike In Stations Going Silent. Many Cited Coronavirus As The Culprit*. (Apr. 29, 2020) (reporting that 35 radio stations went dark in April, bringing the total number of stations off the air to 369).

[15] *See, e.g.,* Inside Radio*, April Saw A Big Spike In Stations Going Silent. Many Cited Coronavirus As The Culprit* (Apr. 29, 2020) (reporting that Bustos Media took regional Mexican and ethnic stations off the air in Seattle-Tacoma and Portland); RAMP, *Staff Furloughs at Meruelo Media* (Mar. 24, 2020) (reporting furloughs at Los Angeles radio station owned by California's largest minority-owned media group); Michael Balderston, *NABOB Joins Call for Stations to Receive Federal Support,* TVTechnology (Apr. 16, 2020) (reporting that in a letter to Congress, NABOB stated that, because its members had seen revenue declines of 40-50 percent, many of them, without federal aid, would be forced to lay off staff, reduce output and possibly stop all operations); Inside Radio, *Salaries Slashed By*

Perhaps most importantly, turning a blind eye to the radio industry's competitive struggles in the advertising marketplace shows the hollowness of the Coalitions' frequent invocation of the "public interest."[16] The Coalitions apparently have no idea what it takes, as a matter of simple economics, for stations to survive in today's hyper-competitive marketplace, let alone to serve the public interest effectively. While the Coalitions blithely called for "innovation," "compelling localized programming" and "investment in local communities" in the radio industry,[17] they did not address the basic issue of how free, OTA commercial stations earn the substantial revenues necessary to pay for this wish list. In fact, empirical evidence has shown that many radio stations, especially those located in mid-sized, small and unrated markets, frequently struggle to earn sufficient advertising revenues to cover their substantial fixed costs, and thus lack the financial resources to innovate,

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15% To 22% For Entravision's Executive Officers (Apr. 20, 2020) (stating that the Spanish-language radio and TV company had been forced to reduce salaries); Inside Radio, *Univision Begins Layoffs*, *Furloughs And Pay Cuts* (Apr. 22, 2020) (reporting that Univision's 58-station radio group expected to write down value of its radio assets by $65-$85 million); Adam Jacobson, *Urban One Moves Forward* With *COVID-19 Cuts*, rbr.com (Apr. 8, 2020) (reporting that Urban One had enacted furloughs and layoffs for "many employees" at its radio stations and expected its TV operations also to be impacted); Adam Jacobson, *Gleason Stations Prepare For Sign-Offs In Maine*, rbr.com (Mar. 25, 2020) (reporting that five stations in small markets in Maine were going silent); Inside Radio, *Coronavirus Poses New Risk To AM Radio* (Apr. 14, 2020) (reporting AM and FM stations going off the air in Idaho, Hawaii, Oregon and North Carolina); Radio Ink, *Association Chair Asks For Fee Break* (May 21, 2020) (head of Colorado Broadcasters Association stating in a letter to FCC Chairman Pai that its members, many of which serve rural areas and geographically dispersed communities highly dependent on radio, were losing up to 75 percent of their Q2 income due to the pandemic and shutdown).

[16] Coalition Comments at 3, 4, 5, 8, 11, 21.

[17] Coalition Comments at 11.

acquire and/or produce more compelling programming, hire more staff and invest in their technical facilities or local communities.[18]

Given the serious and well-documented economic challenges facing the industry, radio broadcasters of all sizes and located across all markets – including dozens of mid-sized and small station groups – have supported NAB's specific proposal for reforming the local radio rules.[19] While the Coalitions wrongly suggested that small and "independent"

[18] NAB Comments at 25; NAB 2018 Quadrennial Comments at 31-36; BIA Radio Study at 31-34. BIA's Study (at 14) also found that, as a direct consequence of the smaller populations and economic and advertising bases available in smaller markets, stations located in Nielsen markets ranked 76 and below earn but a very small fraction of the revenues earned by the average station in the top-10 markets.

[19] *See* Joint Reply Comments of American General Media, Beasley Media Group Licenses, LLC, Bonneville Int'l Corp., Bustos Media Holdings, LLC, Claro Commc'n, LTD, Cumulus Media Inc., Davis Broadcasting, Entercom License, LLC, Galaxy Commc'n, LLC, Golden Isles Broadcasting. LLC, HEH Commc'n, LLC, HJV Limited Partnership, L.M. Commc'n, Mecca Commc'n, Inc., Meruelo Media, LLC, Monticello Media LLC, Oconee Commc'n Co., LLC, QBS Broadcasting, LLC, Radio Training Network, Inc., Roberts Commc'n, Inc., Southern Stone Commc'n, LLC, Tri-State Commc'n, Inc., Withers Broadcasting Companies/Dana Commc'n Corp., Woman's World Broadcasting, Inc., and Word Christian Broadcasting, Inc., MB Docket No. 18-349, at 2 (May 29, 2019) (Joint Replies of 25 Broadcast Licensees); Reply Comments of WBOC, Inc., MB Docket No. 18-349, at 1, 3 (May 29, 2019); Reply Comments of Grant Co. Broadcasters, MB Docket No. 18-349, at 1, 3 (May 13, 2019); Joint Comments of Connoisseur Media, LLC, Mid-West Family Broadcasting, Frandsen Family Stations, Neuhoff Commc'n, Patrick Commc'n, LLC, Townsquare Media, Inc., Midwest Commc'n, Inc., Cherry Creek Media, Eagle Commc'n, Inc., Legend Commc'n, LLC, MB Docket No. 18-349, at 26 (Apr. 29, 2019) (Joint Comments of 10 Radio Broadcasters); Comments of Reno Media Group, MB Docket No. 18-349, at 3 (Apr. 29, 2019); Comments of Alpha Media LLC, MB Docket No. 18-349, at 1 (Apr. 29, 2019); Comments of Vanguard Media, MB Docket No. 18-349, at 2 (Apr. 29, 2019); Comments of Galaxy Commc'n LLC, MB Docket No. 18-349, at 2-3 (Apr. 29, 2019); Comments of West Virginia Radio Corp., MB Docket No. 18-349, at 2, 6 (Apr. 15, 2019); Comments of Dick Broadcasting Co., Inc., MB Docket No. 18-349, at 1, 3 (Apr. 9, 2019); Written *Ex Parte* Communication of Zimmer Radio & Marketing Group, MB Docket No. 18-349, at 1 (Aug. 1, 2019); Comments of Radio Fargo-Moorhead, Inc., MB Docket No. 18-349 at 1, 5 (Sept. 11, 2019); Comments of Local Community Broadcasters, MB Docket Nos. 18-227 & 18-349, at 5-6 (Sept. 24, 2018); Comments of Puerto Rico Radio Broadcasters Ass'n, MB Docket No. 18-349, at 1 (Aug. 15, 2018). Other small broadcasters also have called upon the FCC to reform the local rules. *See* Letter from Aaron J. Leiker, President/General Manager, 25-7 Media, to FCC, MB Docket No. 18-349 (Apr. 30, 2019); Comments of Curtis Media Group, Inc., MB Docket No. 18-349, at 2-3 (Apr. 29, 2019).

radio broadcasters *en masse* oppose reform of the local radio limits,[20] the record in the pending quadrennial ownership review shows otherwise. Broadcasters with stations in mid-sized, small and unrated markets have agreed with NAB's analysis of the economics of radio broadcasting in those markets,[21] and many small broadcasters – beyond supporting reform of the rules – have described the difficult competitive landscape in their specific markets under the current ownership caps.[22] And although the Coalitions may self-interestedly choose to ignore it, the record in the ownership proceeding is replete with evidence documenting the need for, and the significant benefits of, reforming the ownership limits to

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[20] *See* Coalition Comments at 5-8, 17.

[21] *See, e.g.,* Joint Replies of 25 Broadcast Licensees at 14-15 & Attachment B at 3 (updated BIA analysis of the Syracuse, NY advertising market finding that the "competitive impact of new media technologies" is "especially acute in medium and small markets").

[22] *See, e.g.*, Letter from Aaron J. Leiker, 25-7 Media (describing difficulties of maintaining radio stations' financial viability in a small Colorado town and urging FCC to "remove ownership restrictions on small, unrated markets"); WBOC Reply Comments at 1-3 (licensee of four FM and one AM stations in Delmarva Peninsula explaining that the "economics of small-market broadcasting" and growing competition make it "harder and harder to operate without achieving significant local scale"); Radio Fargo-Moorhead Comments at 2-4 (explaining that competitive trends in the advertising market "are most sharply felt by smaller, local broadcasters," and documenting that digital media accounts for the majority of local ad spend in Fargo-Moorhead, ND); West Virginia Radio Comments at 5-6 (agreeing with NAB that permitting greater economies of scale is very important for smaller broadcasters earning limited revenues and urging FCC to adopt NAB's proposal to remove all ownership limits in markets outside the top 75, especially in smaller and undefined markets such as those in West Virginia); Zimmer Radio *Ex Parte* at 1-2 (licensee of ten radio stations in mid-Missouri explaining importance of achieving greater economies of scale to survive in increasingly competitive market); Dick Broadcasting Comments at 1-2 (operator of stations in small and mid-sized markets in North Carolina, South Carolina and Georgia describing the problems experienced by broadcasters in smaller markets with fewer potential advertisers and limited revenues in hiring talented staff, providing strong programming and competing against other outlets for audiences); Grant Co. Reply Comments at 1-2 (independent broadcaster with FM stations in Kentucky and Ohio discussing the difficulties in obtaining funding for small radio station transactions); Decl. of Susan Patrick, Legend Communications of WY, LLC at 2, Exh. C attached to Joint Comments of 10 Radio Broadcasters (detailing loss of ad revenue in small markets and describing how some radio operations in Wyoming "are barely staying on the air, much less providing robust service and programming to their communities").

allow all radio broadcasters to achieve increased efficiencies and scale economies. Parties specifically explained how owning a greater number of stations in a local market enables cost savings that will boost cash flow and permit greater investment in programming and services to the public.[23] They also emphasized that broadcasters in smaller markets with limited ad revenue potential particularly need to achieve local economies of scale.[24] The BIA Radio Study, moreover, demonstrated that increased economies of scale from relaxation of the current caps would improve the financial wherewithal of broadcasters, especially those in smaller markets, and their ability to invest in their stations and services.[25]

In short, NAB agrees with the Commission that the radio "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[26] The Coalitions fail to explain how retaining analog-era ownership

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[23] *See, e.g.,* Joint Replies of 25 Broadcast Licensees at 16 (explaining that increased common ownership will enable elimination of multiple studios and office space, the combination of transmission facilities at common sites, and consolidation of back office services such as financial reporting, billing and accounts payable).

[24] *See, e.g.*, Joint Replies of 25 Broadcast Licensees at 17; WBOC Reply Comments at 1-3; West Virginia Radio Comments at 5-6; Galaxy Commc'n Comments at 6; Radio Fargo-Moorhead Comments at 2-3.

[25] *See* BIA Radio Study at 26-31 (modeling increases in stations' cash flows resulting from combinations not currently permitted under FCC ownership caps, and showing those cash flow benefits to be relatively greater in smaller markets). The record additionally shows that permitting broadcasters to own more stations in local markets will allow them to expand their audiences and, thus, increase their ad revenues. NAB and various broadcasters explained that owning more stations locally enables broadcasters to program each outlet differently to attract different audiences with differing tastes and interests. This not only benefits the public by increasing the diversity of programming available in local markets, but also benefits stations by increasing the size and variety of their audiences and their attractiveness to potential advertisers. *See* NAB 2018 Quadrennial Reply Comments at 40-41; Section II.B.1, *infra*; *see also* BIA Radio Study at 27, 31 & Appendix A (finding that large station clusters appear better able than smaller local groups to turn populations reached (*i.e.*, potential audiences) into actual advertising revenue).

[26] *Revision of Radio Rules and Policies,* Report and Order, 7 FCC Rcd 2755, 2760 (1992).

restrictions on local radio stations in today's competitive communications marketplace promotes their "economic viability" and, thus, their ability to serve the public. Indeed, they notably fail to discuss the only means by which radio stations can maintain their viability, *i.e.*, by successfully competing in an advertising market against myriad traditional and digital media outlets and advertising platforms, including Google and Facebook, which dwarf even the largest radio (and TV) companies and which are not subject to any remotely comparable governmental limits on their scale.[27] And the current pandemic's massive disruption of the advertising market – which the Coalitions also ignore – places the very survival of many radio stations at greater risk and makes the long-needed reform of the artificial ownership caps even more urgent and important.

B. The Coalitions' Discussion of Intramodal and Intermodal Competition Is Incomplete and Inadequate

1. NAB Strongly Disagrees with the Coalitions' One-Sided and Inaccurate Analysis of Intramodal Competition

As an initial matter, the Coalitions' focus on intramodal competition is distinctly one-sided. While contending that competition "*within* each type of audio delivery platform" is important,[28] the Coalitions only address the allegedly limited competition within AM/FM radio.[29] At the risk of pointing out the obvious, satellite radio is the audio delivery platform most characterized by a lack of intramodal competition, as it has precisely one operator, and very large and well-capitalized entities (*e.g.*, Apple, SiriusXM/Pandora, YouTube) are the major players within the online music arena.

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[27] *See* Attachment A, Market Cap Comparison.

[28] Coalition Comments at i (emphasis in original).

[29] *Id*. at 2-3 (stating that their "comments first analyze competition *within the AM/FM radio platform* and subsequently analyze inter-platform competition among and between all types of audio providers") (emphasis added).

In any event, competition is not lacking within the terrestrial radio industry. Despite the Coalitions' complaints about limited intramodal competition and undue consolidation, there were, according to BIA MAPro as of May 6, 2020, 4,661 separate owners of full-power commercial and noncommercial AM/FM radio stations in the U.S., and 7,209 separate owners of all radio outlets (counting full-power, translators and low power FM). The sheer number of radio stations also has greatly increased since passage of the 1996 Telecommunications Act (1996 Act), thereby increasing competition for both listeners and advertising dollars.[30] This dispersion of ownership across thousands of stations in the radio industry is in sharp contrast to the recorded music industry, which is dominated by three major record labels.

Remarkably, the Coalitions' only references to advertising competition seemed to suggest that, if the ownership limits were loosened and some radio station groups increased in size, those broadcasters would *not* have power in the advertising market. In asserting that small AM/FM clusters find it difficult to sell advertising when competing against larger local radio clusters,[31] the Coalition quoted two commenters in the pending quadrennial ownership review who claimed that, if large radio groups limited by the existing ownership caps were permitted to acquire more stations, they would not raise ad rates but could – or even purposefully would – *lower* them to drive smaller radio operators out of business.[32] Because rational business entities with market power in the advertising marketplace would

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[30] As noted in our initial comments, from February 1996 to March 2020, the number of full-power AM/FM stations grew by over 28 percent and the number of translators and boosters more than tripled. *See* NAB Comments at 6, citing FCC News Release, *Broadcast Station Totals as of March 31, 2020* (Apr. 6, 2020); FCC News Release, *Broadcast Station Totals as of February 29, 1996* (Mar. 7, 1996).

[31] Coalition Comments at 6.

[32] Coalition Comments at 7-8.

raise, not lower, their ad rates to earn higher revenues, the Coalitions' line of argument implies that radio groups larger than those existing today would not have the ability to raise their ad rates – a position consistent with the existence of a broad advertising market in which radio stations struggle to compete for ad dollars against an array of traditional media and digital platforms. As noted above in Section II.A., however, the Coalitions declined to address those highly relevant advertising market issues.[33]

The Coalitions' claims about the deleterious effects of the 1996 Act and common station ownership on program diversity and localism also are misplaced and inaccurate.[34] To begin, it is absurd to complain about a lack of diversity in today's digital marketplace with its virtually infinite listening choices for both music and other audio programming via terrestrial stations, satellite radio and online. Looking at terrestrial radio alone, the number of Latino-programmed full-power AM/FM stations in the U.S. has increased by about 70 percent since 2000, reaching 947 stations today, and the number of Asian-programmed stations has grown from 21 in 2006 to 92 today.[35] In addition, 734 stations offer a range of programming targeted to different demographic groups within the African-American community.[36]

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[33] In any event, any ability of larger radio station groups to offer lower advertising rates merely reflects the efficiencies of economies of scale and is not a problem needing to be fixed. In fact, local and small businesses that frequently advertise on radio would welcome lower rates made possible by more efficient ownership structures.

[34] *See* Coalition Comments at 2, 11, 20-21.

[35] *See* May 2020 BIA MAPro data; BIA, *Over-the-Air Radio Service to Diverse Audiences*, at 9-10, Attachment G to NAB Comments, MB Docket No. 06-121 (Oct. 23, 2006). These station counts exclude FM2, FM3 and FM4 digital channels.

[36] These include 377 Urban-programmed stations, as well as stations offering other varied programming including Gospel, R&B, Reggae and Hip Hop. *See* May 2020 BIA MAPro data.

According to Xperi, as of April 2020, there were 2,298 HD Radio stations on air in the U.S., broadcasting an additional 2,197 channels, for a total of 4,495 separate digital channels. The programming on these digital multicast channels runs the gamut from A to V (Alternative to Variety), with many offering programming targeted to minority groups (various Asian, Urban and Spanish formats), niche music programming (*e.g.*, jazz, blues, classical) and religious/Christian programming. In Washington, D.C., for example, local stations' multicast channels air, *inter alia*, diverse and locally-oriented programming including bluegrass/roots, vocal classical, religious music, country classics, R&B, Vietnamese, Hindi, Urban Gospel, Pride (the LGBT channel) and Connecting Vets, designed as a platform for connecting Washington, D.C.'s veteran and active military population.[37] One cannot seriously contend that AM/FM stations fail to air a diverse range of free OTA programming.

Economists and the courts, moreover, have recognized for decades that common ownership of broadcast stations promotes, not retards, the offering of diverse program formats.[38] Numerous studies of the radio industry specifically have shown that the increases in common ownership following the 1996 Act "caused an increase in available programming variety," suggesting that "increased concentration has been good for listeners."[39] A number of other empirical studies reached similar conclusions,[40] as did a paper previously

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[37] *See* https://hdradio.com/stations

[38] *See*, *e.g.*, Peter Steiner, *Program Patterns and Preferences*, *and the Workability of Competition in Radio Broadcasting*, 66 Q. J. Econ. 194 (1952); *Schurz Commc'n*, *Inc*. *v*. *FCC*, 982 F.2d 1043, 1054 (7th Cir. 1992).

[39] Steven Berry and Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting*, Nat'l Bureau of Economic Research, Working Paper 7080 at 25-26 (Apr. 1999). *Accord* Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q. J. Econ. 1009 (Aug. 2001).

[40] *See* NAB 2018 Quadrennial Reply Comments at 46, n. 145 (citing six more radio studies).

commissioned by the FCC to evaluate the effects of ownership structures on programming, advertising prices and listenership for terrestrial radio.[41] This study found that (1) consistent with previous studies, "more concentrated markets are associated with more, not less, program variety"; (2) "consolidation of radio ownership does not diminish the diversity of local format offerings"; (3) "[i]f anything, more concentrated markets have less pile-up of stations on individual format categories and large national radio owners offer more formats and less pile-up"; (4) "consolidation in local radio has no statistically significant effect on average listening"; (5) listeners "served by large radio groups, as measured by the number of commercial stations owned nationally by in-market owners, listen more" (thereby implying that common ownership improves, not impairs, the services offered to audiences); and (6) "consolidation in local radio has no statistically significant effect on advertising prices."[42] And a 2010 GAO report found that within individual markets, the top radio formats differ from the top radio formats nationally, "indicating that programming decisions are locally based on the preferences and interests of listeners within a given market."[43]

Needless to say, the Coalitions do not address these myriad empirical studies that not only contradict their claims about the harms of common station ownership following the 1996 Act, but also show that audiences benefit from common ownership. The Coalitions similarly ignore the previous declarations of broadcasters making clear that if they were

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[41] FCC, 2007 Ownership Study No. 5, Tasneem Chipty, CRA International, Inc., *Station Ownership and Programming in Radio* (June 24, 2007).

[42] *Id.* at 40-45.

[43] Government Accountability Office, GAO-10-369, *Media Programming: Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio*, at 28 (Mar. 2010). GAO additionally analyzed data for the top 10 national radio station owners and found that for most owners "stations' formats were differentiated within individual markets." *Id*.

permitted to own more stations in local markets, they would offer a wider range of programming and enhance local news and sports coverage, including in small markets.[44] Indeed, RTDNA's annual surveys of broadcast stations and local news have shown that many radio stations in markets of all sizes struggle to make their local news programming financially viable and that larger local radio groups (three or more stations) are more likely to have profitable local news and less likely to suffer losses on their local news.[45] And despite those like the Coalitions who lament consolidation as the supposed death knell of radio localism, RTDNA's 2019 report found that the median radio news operation had the same full-time staff size that it did 25 years ago, when RTDNA's annual reports began.[46]

But rather than offer any empirical evidence, the Coalitions merely state – citing nothing to support their claims – that they have long monitored the effects of consolidation and observed how consolidation of AM/FM radio in local markets has decreased diversity of programming and localism.[47] The Commission should not credit the Coalitions' bare assertions, especially in light of the extensive record evidence disproving them.

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[44] See Joint Comments of 10 Radio Broadcasters at 22-23; Decl. of Jonathan Brewster, Cherry Creek Media at 2-3, Exh. C to Joint Comments of 10 Radio Broadcasters; Decl. of Thomas Walker, Mid-West Family at 2-3, Exh. C to Joint Comments of 10 Radio Broadcasters; Decl. of Erik Hellum, Townsquare Media, Inc. at 3-5, Exh. C to Joint Comments of 10 Radio Broadcasters; Decl. of M. Kent Frandsen, Frandsen Media Co. at 2, Exh. C to Joint Comments of 10 Radio Broadcasters; Zimmer Radio *Ex Parte* at 1, 3; Joint Replies of 25 Broadcast Licensees at 18; Decl. of Michael Wright, Midwest Commc'n, Inc. at 3-4, Exh. C to Joint Comments of 10 Radio Broadcasters.

[45] Bob Papper, *Radio News Profits Edge Down but Budgets Edge Up* (May 15, 2019).

[46] Bob Papper, *Radio Staffing Largely Stable* . . . *As Usual* (May 15, 2019). Interestingly, the average number of radio news staffers (per station) unexpectedly increased in 2018, which the report attributed to increased participation by larger newsrooms in the survey.

[47] Coalition Comments at 21.

And finally, while NAB agrees with the Coalitions that the level of minority and female ownership of broadcast outlets is disappointing, they predictably fail to connect – or even try to connect – levels of common ownership of radio stations with minority/female ownership.[48] That is because, as NAB previously explained, structural ownership rules were not designed to and do not promote ownership by minorities and women. The FCC's maintenance of ownership limits since the World War II era has failed to promote diverse station ownership, and, in fact, levels of minority ownership were much lower when the local and national ownership restrictions were at their most strict.[49] NAB again stresses that retaining the existing (or any other) structural ownership limits will not effectively promote new entry into broadcasting because those limits do not address the primary obstacle facing new entrants, especially women and minorities – a lack of access to capital.[50] If the Coalitions want to increase the levels of minority and female ownership of broadcast outlets, they should propose and/or support programs designed to increase new entrants' access to capital. There are, moreover, more ways beyond broadcast outlets for audio (and video) content providers to reach the public today, including many with lower barriers to entry.

2. The Coalitions' Discussion of Intermodal Competition Ignores the Advertising Market and Vastly Underplays the Impact of Competing Content Providers on Radio Stations' Audiences

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[48] See Coalition Comments at 9-10.

[49] *See* NAB 2018 Quadrennial Reply Comments at 17-20. In 1978, the FCC reported that minorities "control[led] fewer than *one percent*" of the commercial radio and TV stations in the U.S. *Id*. at 17-18, quoting *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978) (emphasis in original), and describing the very strict nature of the ownership rules as they existed in the mid-1970s.

[50] *See* NAB 2018 Quadrennial Reply Comments at 18-19; *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Report and Order, 33 FCC Rcd 7911, 7915 (2018) (stating that "access to capital is most often the barrier" to station ownership by new and diverse entities).

Beyond completely failing to analyze intermodal competition in the advertising market, the Coalitions' discussion of competition for audiences among audio platforms is limited and inadequate. As an initial matter, the Coalitions do not recognize that radio stations (and other audio platforms), compete for audiences' time and attention with video platforms as well. Given that the vast majority of consumers today own devices, including mobile ones, that allow them to switch easily between audio and video content, the historical silos dividing audio and video services have lost much their meaning.[51]

More importantly, the Coalitions significantly understated the impact competing audio content providers have had on radio stations' audiences and listenership. While recognizing that terrestrial radio stations compete against satellite radio and online platforms for audiences, the Coalitions downplayed the effect this competition has had by focusing on AM/FM radio's "broad reach."[52] But merely pointing to the still substantial *weekly* reach of terrestrial radio[53] has little relevance to analyzing local radio 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 during a week, it is unsurprising that radio advertising is not sold on the basis of weekly cumulative reach. Rather, as NAB has explained, radio advertising is sold based on stations' Average Quarter Hour (AQH) listening,

[51] *See* NAB Comments at 12-16 (discussing device ownership; how changes in technology have altered the public's media consumption habits; and how multi-purpose digital devices have increased competition between different types of audio providers and between audio and video services).

[52] Coalition Comments at 12, Section III heading; *see also id*. at 15-16, 20 (referring multiple times to the "reach" of AM/FM radio).

[53] *Id*. at 15 (citing Nielsen's weekly reach figures for AM/FM radio).

and BIA previously documented the notable decline over time in radio stations' nationwide AQH full day audiences.[54]

Unlike the cumulative measure of reach cited by the Coalitions, AQH audience metrics directly reflect the competitive and financial viability of stations and are clearly much more relevant for the FCC's analysis of competition in its Communications Marketplace Report and in its pending ownership proceeding. And beyond AQH metrics, NAB and broadcasters have provided extensive additional data showing that vastly increased competition for audiences has significantly affected AM/FM stations by splintering the previously "mass" media market and diverting audiences to myriad other options, especially digital outlets, at the expense of time spent listening to traditional radio.[55]

Interestingly, while the Coalitions here repeatedly stressed that AM/FM radio still "reaches" more listeners than any other platform,[56] musicFIRST elsewhere has proclaimed

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[54] BIA Radio Study at 5; NAB 2018 Quadrennial Comments at 17 (documenting AQH decline of 30.3 percent from 2003-2018).

[55] *See* NAB Comments at 6-12; NAB 2018 Quadrennial Reply Comments at 34-36; NAB 2018 Quadrennial Comments at 17-18; *see also* BIA Radio Study at 3-4 (documenting declines in time spent listening to AM/FM radio due to competition from other sources); Joint Comments of 10 Radio Broadcasters at Exhibit A (explaining that as it became easier for consumers to listen to audio in a variety of different ways, the time that Americans spent listening to radio noticeably decreased, and providing Share of Ear data from 2014-2019); Edison Research and Triton Digital, *The Infinite Dial 2020* (Mar. 19, 2020) (among persons 18+ who had ridden in a car in the last month, 50 percent reported using AM/FM most often, down from 57 percent in 2017); Ron Rodrigues, Sr., *Five Takeaways From The New Edison Research Audio Study* (Nov. 4, 2019) (discussing Share of Ear data from Q3 2019, explaining that digital platforms dominate listening for adults ages 18-54, and concluding that from 2014-2019, "time spent with streaming, podcasts and satellite radio have come at the expense of AM/FM listening time"); Laura Ivey, Edison Research, *edison research's top ten findings from 2019* (*so far*) (Oct. 8, 2019) (finding that persons ages 13-34 spend only 27 percent of their audio time with AM/FM and even those ages 35-54 spend under half (47 percent) of their audio time with radio).

[56] Coalition Comments at 15.

that “digital services are where we now turn for music.”[57] In 2018, musicFIFST commissioned a survey that found (i) “streaming services and YouTube [are] being used by large majorities of listeners,” especially “millennials (ages 18-34), African American and Hispanic adults”; (ii) “[s]martphones and tablets are go-to devices to access music”; and (iii) one-third of adults “report using satellite radio in their cars, including 1-in-2 non-white millennials and 40 percent of non-white adults ages 35 and older.”[58] The FCC should discount the highly situational opinions expressed by musicFIRST here about competition between audio platforms and AM/FM radio’s position in the modern digital marketplace.

C. The FCC Should Decline to Become Involved in an Unrelated Legislative Debate Over Copyright Policy and Must Reject the Music Industry’s Erroneous Argument That Congress’ Refusal to Alter Copyright Law Means the Local Radio Ownership Rules Should Remain Unchanged

Because “AM/FM Radio . . . Still Refuses to Establish a Sound Recording Performance Right,”[59] the Coalitions again urge the Commission to (inaccurately) opine in its Report to Congress that terrestrial radio has an “enormous” competitive advantage over other audio market participants, and also to refrain from loosening the local radio ownership caps.[60] The FCC should reject the music industry’s repetitive invitation to become involved in a decades-long legislative debate about copyright policy. The Coalitions’ and record labels’

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[57] Statement of musicFIRST Executive Director Chris Israel, musicFIRST Press Release, *New Poll*: *Music Listeners Across All Demographics Flocking to Internet and Streaming Services* (Feb. 28, 2018) (musicFIRST Press Release).

[58] musicFIRST Press Release at 1-3, attaching results of January 2018 survey by Morning Consult. Consumer usage of online and satellite options would no doubt be higher today.

[59] Coalition Comments at 16, Heading D.

[60] Coalition Comments at 17-18. *Accord* Joint Comment of musicFIRST Coalition and Future of Music Coalition, MB Docket No. 18-349, at 4 (Apr. 29, 2019) (Coalition Ownership Comments); Comments of musicFIRST Coalition and Future of Music Coalition, MB Docket No. 18-227, at 22, 26-29 (Sept. 24, 2018) (Coalition 2018 Comments).

frustration that *Congress* still refuses – and recently specifically rejected -- changing copyright law by imposing performance rights fees on terrestrial radio stations is not a reason for the FCC to endorse any of the Coalitions' unsuccessful legislative talking points.[61] And third parties' unhappiness over congressional decisions on copyright law is no reason for the FCC to disregard its statutory obligation under Section 202(h) of the 1996 Act to "ensure" that its radio ownership rules "keep pace with the competitive changes in the marketplace."[62]

As NAB also previously explained,[63] the Coalitions' claims that AM/FM radio stations have an "enormous" competitive advantage over other participants in the audio marketplace because Congress has not imposed performance rights fees on local stations

[61] Congress considered and (again) rejected requiring terrestrial radio broadcasters to pay royalties to record labels when it crafted and passed the Music Modernization Act of 2018, thereby reaffirming the value OTA broadcasters provide to their local communities generally, and to performers and the recording industry specifically, through airplay of music to the public without charge. The Coalitions' complaints about terrestrial radio not paying royalties to performers (in addition to composers, whom stations do pay), and their claims about the promotional value of AM/FM radio, should be addressed to Congress, not the FCC. *See* Coalition Comments at 16-18. Similarly, the coronavirus pandemic's economic impact on performing artists also is an issue for Congress, not the Commission. *See id*. at 19-20. While the Coalitions believe that imposing performance fees on stations will financially benefit the music industry, the FCC lacks authority to require performance fees, and its retention of out-of-date radio ownership rules will not improve the music industry's finances but only harm radio stations and their service to the public. Whether the FCC's rules allow a broadcaster to own two, four, six, eight or 10 stations in local markets of whatever size has no effect on the royalties that stations do or do not pay to composers, performers or record labels.

[62] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (stating that the "very purpose of § 202(h)" is to "function as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace'") (citing *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004)). *See also Sinclair Broad. Group v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (stating that § 202(h) was designed to continue the process of deregulation begun in the 1996 Act).

[63] *See*, *e.g*., NAB Reply Comments, MB Docket No 18-227, at 5-6 (Oct. 9, 2018).

are erroneous.[64] While copyright law treats different audio outlets differently in this regard, terrestrial radio stations have many other costs and burdens that do not apply to their marketplace competitors, especially online ones. Every terrestrial radio broadcaster must acquire an FCC license by paying market price for it either in an auction or via an FCC-approved assignment or transfer transaction from an existing licensee; build, acquire and/or lease and then maintain extensive infrastructure, including transmitters, towers, antennas and real property to house them; bear the substantial costs (*e.g.*, electricity) of transmitting an OTA signal to its community of license; comply with FCC regulations ranging from keeping online public and political files and station logs to providing EAS alerts to preparing quarterly issues/programs reports; pay mandatory regulatory fees to the government; and fulfill its statutory obligation to serve its community of license to qualify for renewal of its license every eight years. Above all, FCC-licensed radio broadcasters provide their signals free over-the-air to the listening public and – unlike their satellite and online competitors – cannot charge subscription fees to recoup any of their operational or other costs. And, as discussed in detail above, OTA broadcasters' almost total dependence on advertising revenue have made them more vulnerable than many of their competitors to the extraordinary decline in the advertising market resulting from the current pandemic.

Given the significant costs and burdens borne by terrestrial broadcasters but not by other audio providers, current differences in copyright law do not result in AM/FM stations having an "enormous," "massive" or "huge" (or perhaps any) competitive advantage and are not a valid reason for the FCC to retain outdated radio ownership caps, as the Coalitions

[64] Coalition Comments at ii, 17.

contend.[65] After all, if terrestrial radio stations have such a "significant and unfair competitive advantage over every other audio delivery service,"[66] then how have those services managed to expand and thrive, while many AM/FM stations struggle to cover their fixed costs and remain viable? The illusory "enormous" or "massive" competitive advantage posited by the Coalitions should not be referenced in the FCC's upcoming Report, nor be considered in the pending quadrennial ownership review.

In short, the FCC's Report to Congress on the communications marketplace should focus on how differently audio content is delivered and consumed today compared to the analog past. This Report must make clear that local radio stations now operate in vastly expanded and highly competitive content and advertising markets providing unprecedented choices for consumers and advertisers and that continuing technological change will create yet more options for both in the future. Comments still relying on the alleged "scarcity of frequencies" for those who want to own and operate terrestrial radio stations do not reflect the 21st century marketplace, characterized by proliferating outlets, platforms and choices.[67]

III. MVPD CLAIMS ARE DISCONNECTED FROM MARKETPLACE REALITIES AND UNSUPPORTED BY FACTUAL EVIDENCE OR LAW

ATVA and ACA rehash several well-worn arguments concerning broadcasters' alleged bargaining power in retransmission consent negotiations and renew unmeritorious

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[65] *See* Coalition Comments at 17-18; Coalition Ownership Comments at 4; Coalition 2018 Comments at 22, 26, 29.

[66] Coalition Comments at ii.

[67] Coalition Comments at 3. The results of FCC spectrum auctions do not support the Coalitions' claims of scarcity. In the last five auctions of frequencies for full-power FM stations combined, the FCC retained 147 unsold construction permits, or nearly one-quarter (23.4 percent) of the total number of permits offered in those auctions. *See* www.fcc.gov/auctions, results of full-power FM auctions held in 2015, 2013, 2012, 2011 and 2009.

proposals to regulate multicast programming streams and low power television (LPTV) stations under the ownership rules. In so doing, they turn a blind eye to massive consolidation in pay TV and broadband services, disregard rising competition from entities that are much larger and less regulated than broadcast TV stations, and baselessly blame broadcasters for retransmission consent disruptions. Their arguments are wholly disconnected from marketplace realities and should not inform the Commission's decision-making about competition, retransmission consent or broadcast ownership.

First, contrary to MVPD commenters' claims,[68] the pay TV industry is far more consolidated than the local TV broadcast industry. 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) services, nor any restrictions on their acquisition of or affiliation with programming networks or content. Although pay TV providers face increased competition from OTT video services and have lost some subscribers due to cord cutting, nearly two-thirds of all residential TV households still subscribed to a traditional MVPD service at the end of 2019.[69] Measured by subscribers, the ten largest providers control a whopping 94.8 percent of the nationwide pay TV market and 90 percent of the nationwide broadband market; the top four providers control 79.6 percent of the pay TV market and 70.6 percent of the broadband market; and the top three control 68.2 percent of the pay TV market and 64.3 percent of the broadband market.[70] And as NAB has discussed in multiple

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[68] *See* Comments of ACA Connects (ACA), GN Docket No. 20-60, at 8-11 (Apr. 27, 2020) (ACA Comments); Comments of the American Television Alliance (ATVA), GN Docket No. 20-60, at 2-3 (Apr. 27, 2020) (ATVA Comments).

[69] Kagan, a media research group within S&P Global Market Intelligence (Q4 2019).

[70] Kagan, a media research group within S&P Global Market Intelligence (Q4 2019).

filings, the market capitalizations of many pay TV providers dwarf that of even large TV broadcast groups,[71] with such companies as Sinclair ($1.18 billion) TEGNA ($2.24 billion) and Nexstar ($3.11) punching above their weight class in negotiations with companies like Charter ($102.88 billion), Comcast ($159.61 billion), and AT&T ($200.14 billion).[72]

In addition to ignoring MVPDs' own competitive position and leverage, pay TV commenters completely disregard the competitive landscape facing broadcasters, which directly impacts their position in retransmission negotiations. NAB, in contrast, has extensively documented the splintering of audiences and exponential growth in the amount, variety and quality of video programming. As NAB previously explained, fragmentation in the video programming marketplace, coupled with concentration among MVPDs, gives 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 to as many viewers as possible.[73] In light of these facts, claims that MVPDs are struggling to negotiate retransmission consent with local broadcasters ring hollow.

ACA and ATVA reiterate concerns that LPTV and multicast affiliations with the four major broadcast networks somehow constitute a loophole in the local TV rule, especially the top-4 restriction.[74] To support its erroneous claims, ATVA again relies on an extremely flawed

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[71] *See, e.g.,* NAB 2018 Quadrennial Reply Comments at 26.

[72] Attachment A, Market Cap Comparison.

[73] *See, e.g.,* NAB 2018 Quadrennial Reply Comments 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)).

[74] ACA Comments at 8; ATVA Comments at 2-3 (citing Comments of AVTA, MB Docket No. 18-349 (Apr. 29, 2019) (ATVA 2018 Quadrennial Review Comments).

"analysis" of markets in which LPTV stations and/or some stations' multicast (and primary) streams are affiliated with the four major networks.[75] As NAB previously explained, there are multiple problems with ATVA's analysis.[76] First, many of the markets ATVA examined do not have four full-power commercial stations, so the four major networks cannot be made available to the public in those markets without using multicast streams or LPTV stations. Second, the FCC's prohibition on common ownership concerns top four-ranked stations, not affiliation with certain networks. In many markets, a station other than the ABC, CBS, FOX or NBC affiliate is ranked among the top four. ATVA still has not corrected its analysis to address these flaws.

More importantly, taking the position that multicast and LPTV affiliations with the four major broadcast networks are a problem to be solved flies in the face of Congressional actions[77] and multiple prior Commission decisions emphasizing the value of multicast affiliations and the potential harms of bringing multicast streams or LPTVs within the scope

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[75] ATVA Comments at 2-3 (citing ATVA 2018 Quadrennial Review Comments).

[76] NAB 2018 Quadrennial Reply Comments at 73-74.

[77] 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*, Summary, at 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).

of the local TV rule.[78] As the FCC previously held in declining to adopt more restrictive local TV ownership limits in light of multicasting, the ability to multicast is distinct from owning a separate station.[79] Multicast streams do not qualify for mandatory carriage on cable or DBS systems, and they generate only a tiny fraction of the revenue a full-power station earns.[80] The FCC also has repeatedly recognized multicasting as a means to ensure that smaller markets have a full complement of network affiliates.[81] Multicasting continues to serve this important purpose in many small markets.[82] Changing the local TV ownership rule to

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[78] *See, e.g.,* NAB 2018 Quadrennial Reply Comments at 73-74; NAB 2018 Quadrennial Comments at 78-81. The Commission previously found that dual multicast affiliations involving Big Four networks are generally limited to two situations, neither of which give rise to a need to regulate them: (i) smaller markets where there are not enough full-power commercial TV stations to accommodate each Big Four network; or (ii) other unique marketplace factors responsible for creating the dual affiliation, such as where "a local station has chosen not to affiliate with a Big Four network in favor of providing religious, foreign language, or locally oriented programming, and all remaining full-power commercial television stations in the market are already affiliated with a different Big Four network." *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864, 9892 (2016) (2016 Ownership Order) (citing *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4399-4400 (2014) (2014 FNPRM)). In declining to restrict multicast affiliations, the FCC concluded there was "no benefit in either encouraging an independent station to carry network programming it does not want or in depriving a market of a local affiliate of a Big Four network." 2016 Ownership Order, 31 FCC Rcd at 9892 (citing 2014 FNPRM, 29 FCC Rcd at 4400 n.170).

[79] *See* 2016 Ownership Order, 31 FCC Rcd at 9892 (observing that operating a multicast channel "does not typically produce the cost savings and additional revenue streams that can be achieved by owning a second in-market station").

[80] See NAB 2018 Quadrennial Comments, Attachment H, Multicast Revenue (including all multicast streams except those carrying major network affiliates, the revenue generated by stations' multicast streams are, on average, less than one percent of station revenue).

[81] *See* 2016 Ownership Order, 31 FCC Rcd at 9892 (stating that a "significant benefit" of multicasting is the "ability to bring more local network affiliates to smaller markets, thereby increasing access to popular network programming and local news and public interest programming tailored to the specific needs and interests of the local community").

[82] *See* NAB 2018 Quadrennial Comments at 79. Currently, 88 "short markets" do not have stations affiliated with each of the four major networks. Multicast channels fill the gap with regard to at least one missing network affiliate in 80 of these markets. *Id.* at Attachment I,

effectively restrict the ownership or content of multicast channels could cause consumers in these markets to lose their existing access to valued programming.

Similarly, LPTV stations are not the equivalent of full-power stations and should not be treated as such. Like multicast streams, LPTV stations generally lack mandatory carriage rights (with a few exceptions in the cable context). They operate on a secondary basis and have limited coverage areas and restricted power.[83] For these reasons, the FCC has never applied its ownership rules to LPTV stations,[84] and there is no reason to change course now.

MVPD interests continue to ignore the longstanding positions of Congress and the Commission on these issues, and cannot square their claims with the demonstrable public interest benefits resulting from the affiliations.[85] Far from "evading" the FCC's ownership rules, multicast and LPTV affiliations are entirely consistent with repeated Commission decisions and are benefiting the public as expected. Pay TV providers' claims lack a basis in law or fact and are irrelevant to the Communications Marketplace Report or any FCC rules.

Short Markets. All but three of the 88 short markets are mid-sized to very small (ranked 50-210), and 80 of them are small or very small (100-210). *Id*.

[83] Because of their secondary status, LPTV stations must not cause interference to the reception of existing or future full service TV stations, must accept interference from full service stations, and must yield to new full service stations where interference occurs.

[84] *See, e.g., Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* Memorandum Opinion and Order, 14 FCC Rcd 8724 ¶ 75 (Apr. 20, 1999).

[85] *See, e.g.,* NAB 2018 Quadrennial Reply Comments at 81; Comments of Gray Television, MB Docket Nos. 18-349, at 13-17 (Apr. 29, 2019) (discussing examples of how common ownership of full-power and multicast/LPTV network affiliates has enabled Gray to make significant improvements in station facilities and programming in small markets, such as the following: increase local news by 40 percent in the Lincoln & Hastings-Kearney DMA (#111) and geographically expand access to NBC and local programming within the market; launch local news on an LPTV station affiliated with Fox, as well as sports specials in the Wausau-Rhinelander DMA (#134); add a local news program and upgrade the Fox-affiliated LPTV station's signal to HD in the Minot-Bismarck-Dickinson-Williston DMA (#146); add a local CBS option for viewers in the Biloxi-Gulfport DMA (#156); launch weekend newscasts on a full-power station and morning news on an LPTV station in the Rapid City, SD DMA (#171)).

ACA and ATVA also complain yet again that retransmission consent fees are too high.[86] But pay TV providers' desire to pay less – or even nothing at all – is not evidence that broadcasters can extract supra-competitive prices under current regulations or with rule modifications allowing additional local TV combinations. Contrary to their claims, broadcast stations' signals still appear undervalued in the retransmission consent marketplace. According to Kagan, total broadcast retransmission consent fees were only 15.1 percent of total MVPD programming fees (counting broadcast stations, basic cable, premium cable and regional sports networks) in 2018, even though broadcast stations accounted for one third (33.77 percent) of prime time viewing in 2018 (live + same day counting broadcast, cable and DBS).[87] And in 2018, the year-over-year growth rate in TV stations' retransmission revenues dropped to less than half what it had been in 2017 (down from 17.4 percent to 8.21 percent). This trend continued downward in 2019, with the year-over-year growth rate in TV stations' retransmission revenues dropping by nearly one quarter (23.9%) of what it had been in 2018 (down from 8.21 percent to 6.25 percent).[88] If some MVPDs have opted

[86] ACA Comments at 8; ATVA Comments at 4-5.

[87] U.S. TV Network Industry Benchmarks, database of Kagan, a media research group within S&P Global Market Intelligence (May 2019); Total Broadcast Retransmission & Virtual Sub Carriage Fees Projections, 2006-2023, database of Kagan, a media research group within S&P Global Market Intelligence (June 2018); Nielsen, U.S. Live + Same Day, 2018. NAB is unable to update this analysis for 2019 because Kagan no longer tracks the fees paid by MVPDs to premium cable networks. However, even when considering broadcast retransmission consent fees as a percentage of fees paid only to broadcast stations, basic cable and regional sports networks, retransmission consent fees represented just 23.8 percent of those programming fees in 2019, even though broadcast stations accounted for 29 percent of prime time viewing in 2019 (counting broadcast, cable and DBS). Obviously, broadcast retransmission fees would represent a smaller percentage of total MVPD programming fees if the fees paid to premium cable networks were included in the total. *See* Kagan S&P Global, "Broadcast Retransmission Fees versus Basic Cable and RSN Programming Fees" (June 2019); Nielsen, 2019 Primetime Live + 1 P2 broadcast share.

[88] Kagan S&P Global, "Broadcast Retransmission Fees versus Basic Cable and RSN Programming Fees" (June 2019).

to cease their video offerings and focus their businesses on broadband,[89] it is not because of retransmission consent.

ATVA and ACA also contend that retransmission consent disputes demonstrate a competitive imbalance,[90] with ATVA citing its list of disputes from 2010-2019.[91] The data present a compelling picture of a competitive imbalance, but not the picture ATVA is trying to paint. While NAB has not verified ATVA's list, we examined the disputes on its list from 2015 – 2019. Fully 792 of the 948 market-level disruptions that occurred over those five years, or 83.6 percent, involved only two companies—DISH and AT&T/DIRECTV.[92] Thus, according to ATVA's own data, an overwhelming majority of retransmission consent disruptions involve just two large, well-funded MVPDs and broadcasters who are virtually always smaller in comparison to either of them.[93] Far from demonstrating a problem that needs to be solved with government intervention or ownership regulation, ATVA's data show that there are relatively few retransmission consent-related disputes (as compared to the thousands of smoothly functioning broadcaster-MVPD relationships in place on any given day); that two repeat players are at the center of nearly all the disputes; and that those two parties are significantly larger than the broadcasters on the other side of the negotiating table.

Finally, the Free State Foundation (FSF) offhandedly proposes on behalf of its benefactors that the network nonduplication and syndicated exclusivity rules should be

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[89] ATVA Comments at 5-6.

[90] ACA Comments at 8; ATVA Comments at 3-4.

[91] ATVA Comments at 5 (citing https://www.americantelevisionalliance.org/wp-content/uploads/2019/10/Untitled-spreadsheetSheet1-9.pdf (ATVA List)).

[92] ATVA List. For purposes of our calculation, we treated all disputes involving DIRECTV, AT&T or U-Verse as AT&T/DIRECTV disputes.

[93] *See* Attachment A, Market Cap Comparison.

eliminated as part of an acceleration of the FCC's "deregulatory agenda" because "broadcast TV networks, local network affiliates, and MVPDs all are sophisticated business entities capable of contracting for carriage rights."[94] As NAB has explained on numerous occasions,[95] eliminating the exclusivity rules is not a "deregulatory" step, because the rules do not create any exclusive rights. They merely establish an enforcement mechanism for efficiently effectuating rights already contracted for in arms-length negotiations between broadcast networks and affiliates. Similar to the pay TV industry commenters, FSF has provided no legal or factual evidence to support its proposal to eliminate these rules.

In sum, pay TV commenters offer nothing to controvert extensive record evidence that broadcasters face ever-increasing competition for audiences and advertisers from larger and better funded outlets that face fewer artificial restrictions on their growth. The record shows that continuing to regulate local television stations as if they compete only with each other is an anachronism. NAB again urges the Commission and the Department of Justice to modernize their approaches to broadcast TV ownership regulation and merger review to reflect the current video marketplace.

Such reform is even more urgent due to the unprecedented decline in local television station advertising revenues.[96] One research firm reports that local TV stations saw ad

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[94] Comments of FSF, GN Docket No. 20-60 (Apr. 27, 2020).

[95] *See, e.g.,* Letter from R. Kaplan, NAB to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (Sept. 15, 2015); Letter from R. Kaplan, NAB to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (Sept. 9, 2015); Comments of NAB, MB Docket No. 10-71 (June 26, 2014).

[96] *See, e.g.,* NAB Comments at 39-41; Harry Jessell, *Magid: Local TV To Feel 'Devastating' Ad Impact,* TVNewsCheck (May 4, 2020) (Magid Survey Article); Wayne Friedman, *TV Station Groups See Massive Early Q2 Ad Declines Of 35% To 40%*, TVNewsDaily (May 15, 2020) (Massive Q2 Declines Article).

revenue declines of 40-60 percent in the month of April.[97] Traditional sources of advertising for local TV are in financial straits, with 61 percent of them shut down and only 44 percent confident that they will reopen.[98] Local TV executives have observed that this advertising drop was "more severe and more rapid than the financial recession in 2008,"[99] and analysts anticipate that a full recovery may take even longer than the 2008 recession.[100] Although advertising is in a steep decline, viewership has soared as Americans watch their local TV stations for critical news and information about the pandemic.[101] With the public relying on local TV more than ever and advertising revenue at unprecedented lows, the time to modernize broadcasting's regulatory environment is now. The retention of restrictions that trap local TV (and radio) broadcasters in economically inefficient and competitively unsustainable ownership structures must end.

IV. CONCLUSION

The FCC's upcoming Communications Marketplace Report, and its regulatory policies including the radio and TV ownership rules, must recognize the proliferation of audio and video content providers and digital advertising platforms and their profound competitive impact on local broadcast stations. There is no valid basis for that Report to repeat the legislative talking points of the music industry, and certainly Congress' disinclination to impose performance fees on radio stations provides no rational basis for the FCC to refrain

[97] Magid Survey Article.

[98] Magid Survey Article.

[99] Massive Q2 Declines Article.

[100] Magid Survey Article (discussing how recovery may be lengthy and how some traditional advertisers, such as store front retail and auto, may permanently reduce their TV advertising spend or even close their doors as they lose revenue share to online shopping).

[101] NAB Comments at 39-41.

from reforming its local radio limits. Likewise, the predictable and easily refutable complaints of the MVPD interests about retransmission consent – which have not improved with age and repetition – do little to inform the FCC's inquiries here and have no bearing on the need to reform the local TV rule.

Respectfully submitted,

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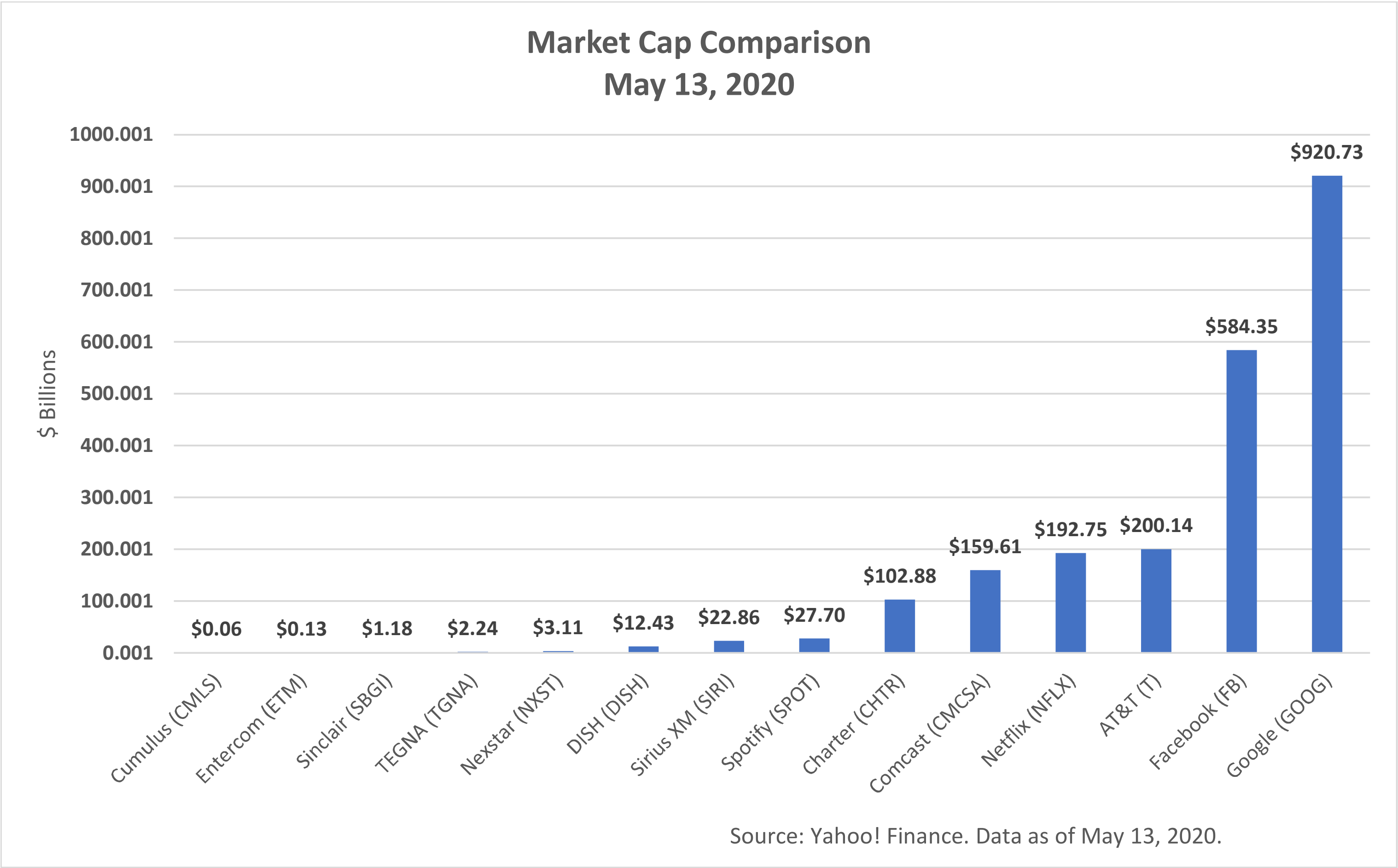
May 28, 2020

Attachment A



Market Cap Comparison
May 13, 2020
$ Billions
1000.001
900.001
800.001
700.001
600.001
500.001
400.001
300.001
200.001
100.001
0.001
$0.06
$0.13
$1.18
$2.24
$3.11
$12.43
$22.86
$27.70
$102.88
$159.61
$192.75
$200.14
$584.35
$920.73
Cumulus (CMLS)
Entercom (ETM)
Sinclair (SBGI)
TEGNA (TGNA)
Nexstar (NXST)
DISH (DISH)
Sirius XM (SIRI)
Spotify (SPOT)
Charter (CHTR)
Comcast (CMCSA)
Netflix (NFLX)
AT&T (T)
Facebook (FB)
Google (GOOG)
Source: Yahoo! Finance. Data as of May 13, 2020.