Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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OPPOSITION OF THE NATIONAL ASSOCIATION OF BROADCASTERS TO PETITION FOR RECONSIDERATION

NATIONAL ASSOCIATION OF BROADCASTERS
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May 6, 2008

Executive Summary

The National Association of Broadcasters ("NAB") submits this opposition to a petition requesting reconsideration of the Federal Communications Commission's quadrennial ownership review order. This order very modestly reformed the complete ban on newspaper/broadcast cross-ownership and made no changes to the television duopoly and local radio ownership rules. NAB urges the Commission to deny this petition.

There is no reason for the Commission to retreat from its recent modest revisions to the outmoded newspaper cross-ownership prohibition, which had not been reformed since its adoption in 1975. Claims in the petition that the "exceptions" could "swallow" the revised rule and somehow harm the public interest are unmeritorious. Under the revised rules, applicants will in fact have a high hurdle to gain approval for proposed newspaper/broadcast combinations (especially newspaper/television combinations) outside the top 20 Designated Market Areas. Nor are the standards for rebutting the negative presumption against newspaper/broadcast combinations in non-top 20 DMAs vague or otherwise insufficient to hold applicants accountable for their representations made while seeking approval of such combinations, as petitioners contend.

Relaxation of the outdated newspaper cross-ownership ban is clearly supported by the record in the lengthy quadrennial ownership proceeding, and modifying the rule is consistent with judicial affirmation of the FCC's 2003 determination that the ban was no longer in the public interest. *See Prometheus Radio Project v. FCC*, 373 F.3d 372 (3^{rd} Cir. 2004). In fact, the voluminous record in this proceeding would have supported a more extensive revision of the newspaper cross-ownership restriction, given the public interest benefits derived from such cross-ownership. There is certainly no reason for the Commission to now cut back on the very limited reform of the ban that it recently approved.

Petitioners also erroneously claim that the transition to digital broadcasting is reason to restrict even further the ownership of television stations in local markets. The Commission should reject this nonsensical argument, as clearly the ability to send a digital signal does not somehow equate to the ownership of additional broadcast television stations. Specifically, the option available to a digital broadcaster to offer multiple program streams (with no right to carriage on multichannel video programming distributors) is *not* the technical, operational and legal equivalent of owning an entirely new station with statutory must-carry rights. As a practical matter, moreover, multiple program streams currently create costs, not efficiencies and not additional revenues.

In addition, petitioners have not made any case for cutting back on the current levels of local station ownership because they have not shown the existence of any specific public interest harms resulting from existing duopolies. Clearly they have not done so because the record in this proceeding demonstrates the benefits to local audiences and to stations from common ownership. In fact, the Third Circuit Court of Appeals in *Prometheus* agreed with the Commission that media other than broadcast television stations contributed to viewpoint diversity in local markets, and agreed that common ownership of television stations can improve local programming. Indeed, in light of the public interest benefits derived from common ownership of television stations and the ever-increasing competition to stations in local markets, the record in this proceeding supports the further loosening of the duopoly rule to allow duopolies in more markets, especially medium and smaller ones where television stations face particularly difficult financial challenges. Reform of the duopoly rule to take account of competitive realities in today's digital, multichannel marketplace would further be consistent with the decision in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), which found the current duopoly rule arbitrary and capricious due to the FCC's exclusion of nonbroadcast media, including cable television, from the rule's "voice" threshold.

Finally, there is no basis for the Commission to cut back on the levels of common ownership of radio stations that Congress set over a decade ago in a less competitive and diverse marketplace. Congress acted in the 1990s against a backdrop of financial crisis in the radio industry, and the changes in ownership structure made possible by the 1996 Telecommunications Act have enabled radio owners to achieve significant efficiencies and financial stability, thereby allowing stations to serve their local communities more effectively. In declining to roll back the radio ownership levels in its quadrennial review decision, the Commission correctly recognized that requiring station divestitures would undermine settled expectations in a market where broadcasters needed regulatory relief to achieve the economies of scale necessary to compete just ten years ago. The petition provides no basis for the Commission to change its decision now.

Despite their assertions, petitioners have failed to show any valid grounds based on traditional competition, diversity and localism concerns for the Commission to reduce the local radio ownership limits. Due to the growing numbers of audio outlets, increasing audience fragmentation and increased competition for advertising, there clearly are no competition-related bases for rolling back the current levels of local radio ownership. Empirical studies in this proceeding do not support reductions in the local radio limits based on diversity and localism grounds, either. Numerous studies by a number of parties have shown that common ownership of radio stations leads to greater programming diversity in local markets, including increased programming targeted to niche audiences. In light of the extensive empirical evidence demonstrating the diversity benefits and lack of competitive harm resulting from common ownership of radio stations, the Commission should have considered continuing the process of relaxing the radio restrictions set in a less competitive and diverse audio marketplace. In any event, the petition presents no basis for the Commission to reconsider its decision to avoid widespread disruption to the industry and to service to the public by declining to roll back the radio ownership levels.

For all these reasons set forth in more detail in NAB's comments, the Commission should deny the petition requesting reconsideration of its recent quadrennial ownership review order.

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OPPOSITION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS TO
PETITION FOR RECONSIDERATION

The National Association of Broadcasters ("NAB")[1] submits this opposition to a petition requesting reconsideration[2] of the Commission's quadrennial

[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

ownership review order, which very modestly reformed the complete ban on newspaper/broadcast cross-ownership.[3] NAB urges the Commission to deny the Petition calling for a retreat from even the minor loosening of the outdated prohibition on newspaper cross-ownership approved in the *Quadrennial Review Order*. NAB also opposes this Petition's unsupportable call for the Commission to roll back the television duopoly and local radio ownership rules. Indeed, the record in this proceeding, as shown by NAB and other parties in many previous submissions, supports further relaxation of the newspaper/broadcast, local television and radio ownership rules.

I. There Is No Reason for the Commission to Retreat from its Modest Reform of the Outmoded Newspaper Cross-Ownership Prohibition

Under the Commission's revised cross-ownership rule, a newspaper/broadcast transaction is presumed as being in the public interest only if the market at issue is one of the 20 largest DMAs, which are all highly competitive and diverse, and additional extensive conditions are met in the case of television/newspaper combinations. *Quadrennial Review Order* at ¶ 53. Newspaper/broadcast combinations outside the top 20 DMAs are presumed to be inconsistent with the public interest, although parties may attempt to rebut that negative presumption, based on an analysis of four specific factors. *Id*. at ¶ 68.[4]

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[2] Petition for Reconsideration of Common Cause, *et al*. in MB Docket No. 06-121 (March 24, 2008) ("Common Cause Petition" or "Petition").

[3] 2006 Quadrennial Regulatory Review, *Report and Order and Order on Reconsideration*, FCC 07-216 (rel. Feb. 4, 2008) ("*Quadrennial Review Order*").

[4] The Commission will consider the following factors in making a finding that the public interest would be served by allowing a newspaper/broadcast combination:

The Common Cause Petition asks the FCC to eliminate this "four factor [waiver] test," alleging that "the exceptions could swallow the rule" and will be "insufficient to protect the public interest." Petition at 2-3. These claims are unmeritorious.

The Commission has stressed that applicants will have a "high hurdle" to gain approval for proposed combinations outside the top 20 DMAs. *Quadrennial Review Order* at ¶ 68. In addition, any applicant attempting to overcome the negative presumption about a major newspaper and television station combination must demonstrate by "clear and convincing" evidence that, post-merger, the "entity will increase the diversity of independent news outlets (*e.g.*, separate editorial and news coverage decisions) and increase competition among independent news sources in the relevant market." *Id.*; 47 C.F.R. § 73.3555(d)(6) (as amended). Given the detail and strictness of the showing that any applicant will need to make to overcome the negative presumption and show that a newspaper/broadcast combination in a non-top 20 DMA would serve the public interest, it is simply inaccurate to say that the "exceptions could swallow the rule."

In any event, even under the law prior to the decision in the *Quadrennial Review Order*, an entity proposing a newspaper/broadcast combination in any sized-market could request a waiver of the cross-ownership rule, which the

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(1) whether the combined entity will significantly increase the amount of local news in the market; (2) whether the newspaper and the broadcast outlet each will continue to employ its own staff and each will exercise its own independent news judgment; (3) the level of concentration in the DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations.

Commission was required to give the requisite "hard look." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Indeed, the Commission in the past has granted long-term or even permanent waivers of the newspaper cross-ownership rule, based on factors similar to the ones set forth in the revised rule. For example, waivers have been granted due to the struggling financial condition of the newspaper or the broadcast station involved in the proposed transaction.[5] The Commission has also previously looked at the level of concentration in the local market, as specified in the new rule.[6] Certainly this previous waiver process did not come close to swallowing the prohibition on newspaper/broadcast cross-ownership, and there is no reason to think that the standards that applicants must now meet to overcome the negative presumption against combinations in non-top 20 markets will somehow do so.

[5] *See Fox Television Stations, Inc*., Declaratory Ruling, 8 FCC Rcd 5341 (1993) (granting permanent waiver of the cross-ownership rule due to bankruptcy of newspaper involved); *Crosby N. Boyd, et al*., Memorandum Opinion and Order, 57 FCC 2d 475 (1976) (granting three-year waiver of cross-ownership rule due to precarious financial condition of newspaper involved); *Field Communications Corporation*, 65 FCC 2d 959 (1977) (granting permanent waiver of ban in large part due to history of financial losses suffered by television station involved in proposed transaction); *Columbia Montour Broadcasting Co., Inc*., Memorandum Opinion and Order, 13 FCC Rcd 13007 (1998) (granting permanent waiver of rule to allow common ownership of newspaper and financially struggling radio station); *Kortes Communications Inc*., Memorandum Opinion and Order, 15 FCC Rcd 11846 (2000) (granting permanent waiver to allow common ownership of newspaper and radio station with history of financial losses).

[6] *See, e.g., Fox Television Station*, 8 FCC Rcd at 5352 (examining the advertising revenues of the proposed newspaper/television combination and finding that such combination did not "endanger Commission policy of preventing undue concentration of economic power"); *Kortes Communications*, 15 FCC Rcd at 11852-53 (examining competition in the local market, including audience share earned by the radio station at issue in the proposed combination).

Common Cause, *et al*. also contend that the four factor waiver test should be eliminated because the factors are "vague" and the FCC did not explain how the factors would be applied together. Petition at 3. In fact, the FCC provided a very detailed, multi-paragraph discussion of these factors, some of which, as discussed above, are similar to the factors that the Commission has applied for years under its previous rule. *See Quadrennial Review Order* at ¶¶ 69-75 and ft. 221 (noting that FCC's application of factors to particular cases will provide further guidance to interested parties over time).

The petitioners further complain that the revised rules provide no "mechanism" by which to hold applicants accountable for "promises" (such as about increasing local news) made while seeking waivers, once their waivers were granted. Petition at 4. This too is untrue. If an applicant failed to live up to any such representations, that failure could be dealt with through typical enforcement actions and could also be raised by any parties during the broadcast property's license renewal process. And, there is nothing in this record to suggest that these tools would be ineffective.

As the FCC has stressed, it has adopted in the *Quadrennial Review Order* a "case-by-case approach." *Id*. at ¶ 52. To the extent the Commission feels the need to adopt additional requirements by which to hold applicants accountable, the agency will easily be able to adopt any such requirements on a case-by-case basis and make those requirements appropriately tailored to the specific circumstances at issue. The fact that the Commission did not include a specific "mechanism" for holding applicants "accountable" as part of its new rule is insufficient reason to eliminate the entire rule allowing parties to attempt to rebut the negative presumption under certain limited circumstances.

NAB notes that, when the FCC did adopt a specific requirement for holding applicants "accountable," the petitioners complain that the requirement is insufficiently detailed. Petition at 4 (wanting FCC to modify or abandon portion of revised rule reversing the negative presumption if the new combination will result in a broadcast station that previously did not offer local news to initiate at least seven hours of local news programming, because the FCC's requirement that licensees report annually about their compliance with this commitment lacked "detail"). Again, the FCC can always, on a case-by-case basis, require applicants to provide any further appropriate detail about such commitments. NAB also finds it ironic that petitioners want to eliminate a provision of the revised cross-ownership rule that would result in a new source of significant local news programming – the type of programming that petitioners have always asserted that they support.

The Commission should not require the owners of broadcast outlets that acquire a same-market newspaper to apply for a waiver within one month, as Common Cause, *et al*. further urge. Petition at 6-7. The Commission does not regulate the free market purchase of newspapers, and any such commonly-held situation will be fully reviewed when the broadcast station in the combination files its next license renewal application. There is no basis for the FCC to depart from its long-standing policy in this regard, especially as the petitioners have merely assumed that the public will be automatically harmed by any temporary cross-ownership situation.[7]

Finally, petitioners contend that the FCC should require applicants to provide increased public notice of proposed newspaper/broadcast merger applications and waiver requests. Petition at 5-6. Beyond the existing public notice requirements imposed on applicants under 47 C.F.R. § 73.3580, the FCC has already addressed this issue by additionally stating that it would "flag such applications in its public notices as seeking waiver" of the newspaper cross-ownership rule. *Quadrennial Ownership Order* at ¶ 79. Petitioners contend that this is still insufficient and call for more frequent and prominent notices in the affected newspaper, the affected broadcast station and on all affiliated websites, arguing generally that the existing public notice requirements in Section 73.3580 are inadequate. NAB notes that these requirements are being comprehensively

[7] The Petition additionally objects to the grandfathering of five specific existing newspaper/broadcast combinations that were acquired before 2001. The Commission grandfathered this small number of combinations to avoid the disruptions stemming from forced divestiture and due to the synergies and new services to local communities that have resulted from these combinations. *Quadrennial Review Order* at ¶ 77. There is no reason for the Commission to alter its decision now. Forced divestitures to existing newspaper/broadcast combinations may be particularly harmful to the companies concerned and to the communities they serve under current marketplace conditions. *See, e.g.*, NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 116-117; NAB Reply Comments in MB Docket No. 06-121 (Jan. 16, 2007) at 89-90; Newspaper Association of American ("NAA") Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 41-45 (discussing financial and circulation declines suffered by newspaper industry). Just the past few days have seen numerous addiitonal accounts of newspapers reporting substantial declines in circulation and revenues. *See, e.g.*, Associated Press, *Most Papers Again Report Big Declines in Circulation*, nytimes.com (April 29, 2008); Nat Ives, *The Newspaper Death Watch*, Advertising Age (April 28, 2008).

reexamined in two pending proceedings and should not be addressed in this narrow petition for reconsideration.[8]

In sum, petitioners have shown no reason for the Commission to retreat from its recent modest relaxation of the outdated newspaper/broadcast cross-ownership ban, which had not been reformed since its adoption in 1975. Indeed, relaxation of the total ban is clearly supported by the record in this proceeding, and modifying the rule is consistent with judicial affirmation of the Commission's 2003 determination that the ban was no longer in the public interest. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-99 (3rd Cir. 2004) (concluding that "newspaper/broadcast combinations can promote localism" and that a "blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity"). In fact, the voluminous record in this proceeding supports a more extensive revision of the newspaper cross-ownership restriction than that adopted, given the public interest benefits derived from such cross-ownership.[9] There is certainly no reason for the Commission to cut back on the very limited reform of the ban that it appropriately approved in response to any arguments raised in the current Petition.

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[8] *See Broadcast Localism*, Notice of Proposed Rulemaking, FCC 08-218 (rel. Jan. 24, 2008) at ¶ 24 (asking for comments on enhancing the public notice requirements for renewal applications); *Revision of the Public Notice Requirements of Section 73.3580*, Notice of Proposed Rulemaking, FCC 05-10 (2005) (seeking comment on modifying the notice that broadcast station buyers and sellers must provide to the public about proposed assignments and transfers of control).

[9] *See, e.g.*, NAB Comments in MB Docket No. 06-121 (Dec. 11, 2007) at 3-15; NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 110-120; NAB Reply Comments in MB Docket No. 06-121 (Jan. 16, 2007) at 81-91; NAA Comments in MB Docket No. 06-121 (Oct. 23, 2006).

II. The Transition to Digital Broadcasting Provides No Basis for the FCC to Restrict Even Further the Ownership of Television Stations in Local Markets

Common Cause, *et al*. claim that the Commission should adopt an even stricter television duopoly rule because of the on-going transition to digital broadcasting. Petition at 11-14. This nonsensical argument should be rejected. Clearly, the ability to send a digital signal does not somehow equate to the ownership of additional television broadcast stations.

Petitioners erroneously contend that the option, made available by digital technology, for television broadcasters to include multiple programming streams within their broadcast signals justifies rolling back the modest loosening of the duopoly rule that the FCC adopted in 1999.[10] This claim is unfounded and reflects a fundamental misunderstanding of the digital transition and the video marketplace. Petitioners mistakenly assume that the capability of a broadcaster to offer multiple program streams (with no right to carriage on multichannel video programming distributors) is the technical, operational and legal equivalent of owning an entirely new station with must-carry rights. Digital technology enables a broadcaster to choose between transmitting a single, high quality HD programming stream or several, lower resolution programming streams. When broadcasters elect to air HDTV, they typically transmit a single programming

[10] Under this 1999 rule, which remains in effect, the common ownership of two television stations in the same DMA is allowed only if (1) at least eight independently owned and operating full-power television stations will remain in the DMA after the proposed combination, and (2) at least one of the merging stations is not among the top-four ranked stations in the DMA, based on audience share. This rule effectively prohibits duopolies in most markets (especially those outside the top 50 largest).

stream, the very same number of streams (one) as in the analog environment. Clearly, then, no new station is magically created, as petitioners imagine, when a station transmits in digital; it is still one station, subject to the same intensely competitive market conditions that many commenters in this proceeding have documented and that in fact call for a loosening (not tightening) of the duopoly rule.

Moreover, the opportunities made possible by digital technology are not yet a present business reality for broadcasters, as shown by the chart below. In all DMAs, digital television revenues ranged, on average, from 0.1% to, at most, 0.5% of broadcast stations' entire revenues. On average across all DMAs, digital television revenues constituted only 0.2% of a television station's entire revenues.

Digital Broadcast Operations Revenue
Includes affiliated stations: ABC, CBS, FOX, NBC

Market Size	2006 Average Dollar Amount	% of Net Revenue
All Affiliate Stations	$39,935	0.2%
1-25	$86,065	0.1%
26-50	$66,290	0.2%
51-75	$40,706	0.2%
76-100	$15,263	0.1%
101-125	$41,011	0.5%
126-150	$23,945	0.4%
151-175	$19,665	0.4%
176-200	$14,073	0.4%
201+	$2,469	0.1%

Source: 2007 NAB/BCFM Television Survey Database

Digital Broadcast Operations Revenue is defined as any revenue derived from digital broadcast operations. Includes any multicast advertising revenues.

Net Revenues is defined as a total of gross advertising revenues, plus network compensation, plus trade-outs and barter, plus digital broadcast operations revenue, plus other broadcast related revenues minus agency and rep commissions.

Furthermore, the opportunities made possible by multicasting may never be fully realized. Broadcasters have no assurance that any multiple program streams they offer will reach audiences viewing their signals through multichannel operators. This is because such operators may strip out and block consumers from viewing portions of the broadcasters' signals. Obviously, advertisers will pay very little for ads on programming streams that do not reach the majority of the viewing public, and there is certainly no reason to expect advertisers to pay more for advertisements on a digital signal, simply because it is not analog. In fact, many broadcasters have indicated that they will not even invest in developing additional digital programming for multicast channels if those streams are not carried by cable.[11]

For these reasons, petitioners' apparent assumption that the technical capability to provide multiple program streams will produce the same economic and operational efficiencies that broadcasters may generate through jointly owned stations with carriage rights is simply wrong. Especially at the current time, multiple program streams create cost, not efficiencies. Any additional programming that the broadcaster would air on those streams must be separately produced or procured, in many cases at considerable expense.

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[11] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2554 (2006). There is also the still-unresolved question of whether advertiser-supported multicasting might tend to divide (rather than increase) a station's audience, thus providing little if any additional revenues.

These costs would be addition to the very high costs that the statutorily-mandated digital transition has already placed on broadcast stations.[12] In sum, the very premise of petitioners' argument for rolling back the television duopoly rule – that a multicast programming stream that may be stripped out by multichannel operators is comparable to an entire, separate broadcast station with statutory carriage rights – is clearly erroneous.

NAB further observes that Common Cause, *et al*. have not made any case for cutting back on current levels of local station ownership because they have not shown – indeed, they have not even asserted – the existence of any specific public interest harms resulting from existing duopolies. Likely they have not attempted to do so because the record in this proceeding so clearly shows the benefits to local audiences and to stations from common ownership. In fact, the Third Circuit in *Prometheus* agreed with the FCC that media other than broadcast television stations contributed to viewpoint diversity in local markets, and agreed that common ownership of television stations "can improve local programming." 373 F.3d at 414-16.[13]

[12] NAB has previously documented the extensive costs of the digital transition and the considerable burden this has placed on many stations, particularly ones in smaller markets. *See, e.g.*, NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 90-92; NAB Reply Comments in MB Docket No. 06-121 (Jan. 16, 2007) at 65-69.

[13] NAB has previously summarized the various studies in this proceeding showing public interest benefits to be gained from duopolies, including improved programming that earns higher audience shares, greater likelihood of airing local news, and offering greater amounts of news programming generally. *See* NAB Comments in MB Docket No. 06-121 (Dec. 11, 2007) at 16-19.

In fact, in light of the public interest benefits derived from common ownership of television stations and the ever-increasing competition to stations in local video markets, the record in this proceeding supports the further loosening of the duopoly rule to allow duopolies in more markets, especially medium and smaller ones. As previously discussed by NAB and other commenters in detail, the record clearly demonstrates how increases in cable and satellite viewing and advertising, and the development of other sources of competition for viewers and advertisers (especially Internet-based ones), have adversely affected the competitive and financial position of local broadcast television stations.[14] The Commission itself recently recognized how "the fragmentation of the market for video programming" and competition between broadcasters and cable for viewers and local advertising revenues have lead to an erosion in the competitive position of broadcast stations.[15] The agency also recognized that the economic health of many broadcasters, especially independent, non-major network affiliated ones, and smaller market stations, "is particularly tenuous."[16]

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[14] *See* NAB Comments in MB Docket No. 06-121 (Dec. 11, 2007) at 19-23; NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 12-35, 106-110; NAB Reply Comments in MB Docket No. 06-121 (Jan. 16, 2007) at 16-32; 60-65; Hearst-Argyle Television, Inc. Comments in MB Docket No. 06-121 (Oct. 23, 2006).

[15] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 07-170 (rel. Nov. 30, 2007) at ¶¶ 49, 52 and ft. 192 ("*Third Report and Order*").

[16] *Third Report and Order* at ft. 192. The Commission expressly noted that broadcasters in smaller markets and stations affiliated with minor networks "have more restricted revenue opportunities," which has lead to "economic difficulties" including a record of financial losses. *Id*.

Given the extensive record in this proceeding and express Commission findings about the competitive and financial difficulties affecting local television stations, the Commission should have reformed the current duopoly rule to more freely allow duopolies in markets of all sizes. Beyond failing to take account of competitive realities in the video marketplace, the Commission's failure to do so is inconsistent with the D.C. Circuit's mandate in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (finding current duopoly restriction arbitrary and capricious due to FCC's failure to justify exclusion of nonbroadcast media, particularly cable television, from the eight voice threshold).[17] In any event, there is certainly no sound basis for the Commission to grant the Petition and cut back even further on the allowable levels of common ownership of television stations in local markets in today's digital, multichannel marketplace.

III. There Is No Basis for the FCC to Cut Back on the Levels of Common Ownership of Radio Stations that Congress Set Over a Decade Ago in a Less Competitive and Diverse Marketplace

The Petition sets forth no grounds for rolling back the levels of common ownership in local radio markets that Congress established over a decade ago in a less competitive and diverse audio marketplace. As NAB has previously discussed in detail,[18] Congress acted in the 1990s against a backdrop of financial crisis in the radio industry in which over half of all commercial stations were losing money, hundreds of stations had ceased broadcasting and economic

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[17] *See also* Section 202(h) Telecommunications Act of 1996 (the FCC must review its broadcast ownership rules every four years to determine if they "are necessary in the public interest as the result of competition").

[18] NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 71-73.

stress "substantially threatened" the industry's ability to serve the public interest.[19] Given that the changes in ownership structure made possible by the Telecommunications Act have "enable[d] radio owners to achieve significant efficiencies" and have "brought financial stability" to the "radio industry,"[20] deference to Congress's 1996 decision (contrary to Petitioners' contention) is fully justified. *See* Petition at 20. Such deference is also warranted, as the Commission explained,[21] to avoid the disruption that forced divestiture would cause an industry that clearly suffered financially and competitively in the past from "artificial constraint[] that prevent[ed] valuable efficiencies from being realized" by station owners. *1992 Radio Ownership Order*, 7 FCC Rcd at 2760. Although the petitioners casually dismiss any claimed public interest in avoiding industry disruption (*see* Petition at 21), the Commission correctly recognized the significant interests in avoiding such disruption and the effects such disruption would likely have on service to the public. *See Quadrennial Review Order* at ¶ 120. Indeed, the Supreme Court has previously recognized the important interests in avoiding widespread divestiture of stations by existing owners that

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

[20] *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 at ¶ 293 (2003) ("*2002 Biennial Ownership Order*").

[21] *See Quadrennial Review Order* at ¶¶ 119-120 and ft. 384.

have acquired and invested in their stations in good faith based upon existing law.[22]

Common Cause, *et al*. have also failed to show valid grounds based on traditional competition, diversity and localism concerns for the Commission to now reduce the levels of common ownership of radio stations specifically deemed appropriate by Congress before the development and widespread use of competing audio services, including Internet radio, satellite radio, iPods and music downloading. *See* Petition at 15-17; 19-20 (making various competition, diversity and localism-related claims). Contrary to petitioners' assertions (at 20-21), the Commission cannot properly rely on the quadrennial review provision to cut back on the level of common ownership specifically permitted by Congress in 1996.[23] As previously discussed in detail by NAB, the language of the quadrennial review statute (with its emphasis on repealing or modifying unnecessary rules) and the clear deregulatory intent of Congress when adopting the review requirements, would not appear to give the FCC the authority to re-regulate local radio markets by adopting numerical ownership limits more strict

[22] *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803-809 (1978) (upholding FCC's determination not to order widespread divestiture of existing newspaper/broadcast station combinations after adoption of cross-ownership ban in 1975 due to "public-interest harms" identified by FCC as resulting from "sweeping divestiture").

[23] *See Sinclair Broadcast Group, Inc. v. FCC,* 284 F.3d 148, 159 (D.C. Cir. 2002), *quoting Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) (the review provision was designed "to continue the process of deregulation").

than the ones expressly set by Congress, particularly given the increase in competition among audio services in local markets.[24]

Certainly the record in this proceeding presents no competition-related bases for reconsideration of the *Quadrennial Review Order*. Empirical studies have shown that the common ownership of radio stations in local markets "has no statistically significant effect on advertising prices."[25] Common ownership nationally in fact has a "statistically significant, negative effect on advertising prices." *CRA Radio Study* at 41. The results of this 2007 study on advertising rates are further consistent with several previous studies of the radio industry.[26]

Indeed, it is hardly surprising that several empirical studies have concluded that radio groups do not exercise undue market power in today's media marketplace, given the ever increasing levels of competition radio stations

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[24] *See* NAB Comments in MM Docket Nos. 01-317 and 00-244 (March 27, 2002) at 4-15. *See also* NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 3-5; NAB Reply Comments in MB Docket No. 06-121 (Jan. 16, 2007) at 6-8.

[25] Tasneem Chipty, CRA International, Inc., *Station Ownership and Programming in Radio* (June 24, 2007) ("*CRA Radio Study*") at 40.

[26] A recent academic study concluded that ownership changes after 1996 have not caused increases in advertising pricing. *See* Joel Waldfogel & Julie Wulf, *Measuring the Effect of Multimarket Contact on Competition: Evidence from Mergers Following Radio Broadcast Ownership Deregulation,* 5 B.E. J. Econ. Analysis & Policy 1, Article 17 (2006). *See also* NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 74-76 (discussing several earlier studies of the radio industry showing that common ownership has not led to the exercise of market power by radio groups or to higher ad prices); Charles Romeo and Andrew Dick, *The Effect of Format Changes and Ownership Consolidation on Radio Station Outcomes*, 27 Rev. Ind. Org. 351, 354 (2005) (concluding that format changes by smaller radio groups or individual stations can counter or defeat the potential exercise of market power by any radio group that acquires a substantial share of a particular audience demographic through merger).

face for listeners and vital advertising dollars.[27] Due to the growing numbers of audio outlets and increasing audience fragmentation, even market leading stations must continually find new ways to earn audience share, and stations find it increasingly challenging to maintain listenership shares, particularly among younger listeners.[28]

As NAB also described in earlier submissions, empirical studies in this proceeding (including the FCC's own) do not support roll back of the local radio ownership caps on diversity and localism grounds.[29] Numerous studies by several parties have shown that common ownership of radio stations leads to greater radio programming diversity in local markets. The *CRA Radio Study* (at

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[27] *See* NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 12-22; 31-35; NAB Reply Comments in MB Docket No. 06-121 (Jan. 16, 2007) at 32-33 (describing how satellite radio and new Internet applications and devices, including streaming, podcasting and iPods, now all compete with traditional radio stations in local markets for listeners and advertisers). *See also* BIA Financial Network, *A Review of the Future of Music Coalition Study: Missing a Basis in the Reality of the Radio Industry* at 2-3; 9-12, NAB *Ex Parte* in MB Docket No. 06-121 (Nov. 1, 2007) (discussing how competition is impacting terrestrial radio, including listening levels, advertising and stock prices).

[28] *See, e.g.*, NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 73-74; 84-86; NAB Reply Comments in MB Docket No. 06-121 (Jan. 16, 2007) at 51-52; Attachment D to NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006), *Aggregate Shares of Top 5 Stations in Top 100 Arbitron Markets: Spring 2006 vs. Spring 2001 and Spring 1996*.

[29] *See* NAB Comments in MB Docket No. 06-121 (Dec. 11, 2007) at 24-25. The FCC's own studies found that (1) having a sibling news station in the market appeared to increase a radio station's propensity to adopt a news format by about 50%, and (2) radio stations owned by parents having more pervasive radio operations were more likely to air informational programming, especially public affairs programming. *See* FCC, Craig Stroup, *Factors that Affect a Radio Station's Propensity to Adopt a News Format* (2007) at III-16; FCC, Kenneth Lynch, *Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay* (July 30, 2007) at II-1.

44-45) conducted for the Commission found that "more concentrated markets are associated with more, not less, program variety" and that "consolidation of radio ownership does not diminish the diversity of local format offerings." Indeed, "[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." *CRA Radio Study* at 44. Beyond this study, NAB's earlier comments identified eight additional studies finding that common ownership of radio stations resulted in the offering of more diverse and more targeted programming to local audiences.[30] Moreover, listeners "served by large radio groups, as measured by the number of commercial stations owned nationally by in-market owners, listen more," and "stations operating in markets with other commonly owned stations achieve higher ratings" than "independent stations." *CRA Radio Study* at 42-43. Clearly, the common ownership of radio stations leads to the airing of improved programming preferred by greater numbers of listeners.

Petitioners' claim that the mere reduction in the number of separate owners of radio stations automatically means there has been a reduction in diversity or some other harm to the public interest is not warranted. *See* Petition at 17. As an initial matter, there is no recognized optimal number of total station owners that should be maintained for all time and under all marketplace

[30] *See* NAB Comments in MB Docket No. 06-121 (Oct. 22, 2007) at 21-22. This has included greater numbers of stations airing programming targeted to members of niche groups including minority groups, such as Spanish and other foreign language speaking listeners and African American listeners. *See* Attachment G to NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006), BIA Financial Network, *Over-the-Air Radio Service to Diverse Audiences* at 8-16.

conditions.[31] A modest decline in the number of individual owners of radio stations since the early 1990s does not automatically mean that harm to the public interest has occurred. A large number of individual owners of radio and television stations still remain in local markets.[32] And, given the economics of the radio industry, these broadcasters may well be in a stronger position to serve the public.

Petitioners further erroneously assume, without empirical support, that a decline in the number of separate station owners "leads to a commensurate reduction in viewpoint diversity." Petition at 17. As previously discussed by NAB, the connection between ownership and viewpoint or content diversity

[31] In fact, as discussed above, the strict ownership limits prior to 1996 contributed directly to the financial and competitive struggles of the radio industry – and imperiled the ability of the industry to serve the public interest. *See Quadrennial Review Order* at ¶¶ 119-120 (the earlier "inability of stations to seek efficiencies through consolidation may have contributed to the industry's financial difficulties" and lowering the ownership limits now "could undermine efficiency gains" that "could bolster stations' financial standing and increase their ability to provide their local communities with quality programming").

[32] A survey of 25 randomly selected DMAs of various sizes (ranging from top-10 to 200+) found that, on average, there were in 2006 8.8 different owners of the 11.7 full-power television stations and 37.6 different owners of the 73 radio stations in the markets examined. *See* NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at Attachment A, BIA Financial Network, *Media Outlets Availability by Markets* at i. And these figures understate the number of separate owners serving local markets because consumers routinely access out-of-market stations (especially radio) and can now, of course, access radio stations from around the country and the world via the Internet. *See* NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at Attachment C, BIA Financial Network, *A Second Look at Out-of-Market Listening and Viewing: It Has Even More Significance* at 6 (finding that about one-third of the radio listening in Arbitron markets goes to sources other than in-market commercial stations).

remains unproven.[33] Indeed, recent research has indicated that the viewpoint or "slant" of media outlets is driven more by the demands of the targeted market (in other words, by consumer preferences) than by the views of any particular owner.[34] Thus, petitioners' unsupported assertions that the mere reduction in the number of separate owners of broadcast outlets alone has automatically harmed diversity in local markets provide no basis to cut back on the permitted levels of radio ownership, especially in light of the development of other numerous competing audio and video outlets.

Finally, Common Cause, *et al*. fault the *Quadrennial Review Order* for failing to address how cutting back on the local radio limits could increase ownership opportunities for minorities and women. Petition at 17. NAB points out that the Commission has specifically adopted a number of proposals to expand opportunities for small businesses, including minority- and female-owned

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[33] NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006) at 42-48; NAB Reply Comments in MB Docket No. 06-121 (Jan. 16, 2007) at 37-43.

[34] *See* Matthew Gentzkow & Jesse M. Shapiro, What *Drives Media Slant? Evidence from U.S. Daily Newspapers* (Nat'l Bureau of Econ. Research, Working Paper No. 12707, 2006); Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (June 13, 2007). Even prior to this most recent research, the FCC had found that commonly-owned media outlets "do not necessarily speak with a single, monolithic voice." *2002 Biennial Ownership Order* at ¶ 361. In *Prometheus*, the Third Circuit noted the "conflicting evidence in the record on whether ownership influences viewpoint" and found that the FCC "reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias to warrant sustaining" the ban on newspaper/broadcast cross-ownership. 373 F.3d at 399-400.

ones, and is currently exploring additional ways to promote opportunities for socially and economically disadvantaged businesses.[35]

In addition, as earlier discussed by NAB, the record in this proceeding does not, contrary to Petitioners' assertions,[36] demonstrate a link between common ownership of broadcast stations and decreased opportunities for minorities and women in broadcasting.[37] NAB previously pointed out that comments filed by the Center for Regulatory Effectiveness ("CRE") showed that claims by Consumers Union, Consumer Federation of America and Free Press that common ownership leads to reduced minority and female ownership were not supported even by the data submitted by these parties.[38] Earlier studies,

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[35] *See Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking in MB Docket No. 07-294, FCC 07-217 (March 5, 2008). NAB has supported a number of these initiatives. *See* NAB Comments in RM-11388 (Sept. 5, 2007); NAB Comments in MB Docket No. 06-121 (Oct. 1, 2007); NAB Reply Comments in MB Docket No. 06-121 (Oct. 16, 2007).

[36] Petitioners assert that the common ownership of broadcast outlets leads to a decline in the level of minority and female ownership and that lowering the radio ownership limits would make it easier for minorities to obtain capital and purchase broadcast stations. Petition at 18-19.

[37] *See* NAB Reply Comments in MB Docket No. 06-121 (Nov. 1, 2007) at 33-38.

[38] *See Consumers Union, et al. Has* Not *Demonstrated a Link Between Market Concentration and Minority/Female Station Ownership*, CRE Reply Comments in MB Docket No. 06-121 (Oct. 2007) at 4 (finding that members of minority groups owned a *greater* number of television stations in 2006 than they did before the FCC modestly relaxed the duopoly rule in 1999). CRE also pointed out that the CU/CFA/Free Press study making these claims about the deleterious effects of common ownership of broadcast outlets did not provide data on changes over time in female-owned television stations or in minority- and female-owned radio stations. *Id*. at 4 note 10. Another study purporting to find that the 1999 relaxation of the duopoly rule has had a negative impact on minority/female ownership of television stations was found during the peer review process to be "fatally flawed." B.D. McCullough, Peer-Review Report on "The Impact of the

moreover, found that "minority groups [ ] increased their radio ownership" after 1996.[39]

Moreover, as commenters in this proceeding have explained, ownership restrictions artificially depress the value of broadcast stations, which harms existing minority/female owners and does not aid members of minority groups or women acquiring stations. For existing minority/female owners, ownership restrictions reduce the asset and net worth values of their stations, which in turn reduces their borrowing capabilities (and thus their ability to acquire additional broadcast properties, to upgrade programming, or to make other investments in their stations). Since access to capital is a key barrier to expansion or to entry for minority/female broadcasters, ownership restrictions that reduce the capital of existing minority- and female-owned station owners will not increase their ability to acquire additional broadcast properties, but will in fact decrease their ability to do so. With regard to potential minority and female entrants into the broadcast industry, ownership restrictions that reduce the value of broadcast properties makes stations easier to purchase by *all* investors (including those with greater access to capital), not just by women and minorities. *See* CRE Reply Comments

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FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006" by Hammond, *et al*. (finding that the Hammond duopoly study failed to consider or control for economic, demographic or other differences in television markets and that such errors "pervade[] every aspect of the analysis").

[39] National Telecommunications and Information Administration, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States* (Dec. 2000) at 38. *See also* Kofi A. Ofori, *Radio Local Market Consolidation & Minority Ownership* at 10-12, Attached as Appendix One to Comments of MMTC in MM Docket Nos. 01-317 and 00-244 (March 27, 2002) (showing increase in the number of minority owned and controlled radio stations since 1997).

at 2-4. For these reasons, petitioners' empirically suspect claims about the effects of common ownership on the level of minority/female ownership of broadcast stations do not justify reconsideration of the FCC's decision to retain the existing local radio caps.

In short, the record in this proceeding, including the FCC's own studies, clearly show that the Commission correctly rejected in its *Quadrennial Review Order* calls by some parties to further increase restrictions on local radio ownership.[40] To the contrary, the diversity benefits and lack of competitive harm resulting from common ownership should have led the Commission to continue the relaxation of these decade-old limits. Certainly the Petition contains no basis for the Commission to reconsider its decision to avoid widespread disruption in the industry and service to the public by declining to roll back the ownership levels expressly set by Congress in a less competitive and diverse media marketplace.

[40] NAB notes that the FCC has already cut back on the levels of common ownership of radio stations permitted in local markets. In the *2002 Biennial Review Order*, the FCC altered its traditional method of defining radio markets by adopting Arbitron metro markets. This market modification had the clear effect of reducing the permissible levels of common ownership in local radio markets. *See id*. at ¶ 486. Petitioners state that the FCC's 2003 decision to grandfather the local radio groups made non-compliant with the local radio rules by the adoption of tighter market definitions was arbitrary and capricious. *See* Petition at 22. As an initial matter, it is years late to raise this argument in a petition for reconsideration. Moreover, as the FCC clearly explained five years ago, requiring divestiture, rather than grandfathering, would unfairly penalize parties who acquired and invested in stations in good faith in accordance with the rules, and would be unduly disruptive to the industry. *Id*. at ¶ 484.

IV. Conclusion

For all the reasons set forth in detail above, the Common Cause Petition provides no basis for the Commission to change course and reverse the very modest reform of the outdated prohibition on newspaper/broadcast cross-ownership adopted in the *Quadrennial Review Order*. The Petition also presents no factual, policy or legal basis for the Commission to alter its previous decisions and to now roll back the television duopoly and local radio ownership rules. As shown in this proceeding by many parties, the record in fact supports further relaxation of the local broadcast ownership rules. Especially in light of the technological and competitive developments in media markets over the past decade, the Petition must be denied.

Respectfully submitted,

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May 6, 2008

CERTIFICATE OF SERVICE

I, Jerianne Timmerman, Deputy General Counsel for the National Association of Broadcasters, hereby certify that a true and correct copy of the foregoing Opposition of the National Association of Broadcasters was sent this 6th day of May, 2008, by first class mail, postage prepaid, to the following:

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