

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

In the Matter of)	
)	
2018 Quadrennial Regulatory Review – Review of)	MB Docket No. 18-349
the Commission’s Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section)	
202 of the Telecommunications Act of 1996)	
)	
Rules and Policies to Promote New Entry and)	MB Docket No. 17-289
Ownership Diversity in the Broadcasting Services)	

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

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	THE FILINGS BY OPPONENTS OF OWNERSHIP REFORM EXHIBIT MYRIAD LEGAL, FACTUAL, EVIDENTIARY AND COMMON SENSE FAILINGS.....	6
	A. Parties Decrying Any Reform Ignore or Misstate Applicable Legal Standards and FCC Precedent	6
	B. Commenters Against Modernization of the Rules Fail to Recognize Basic Economic Truths, Resulting in Illogical, Unsupported and Unsupportable Arguments	10
	C. Parties' Opposition to Any Alterations in the Ownership Rules Will Not Promote and Will Likely Harm Their Professed Goals.....	17
III.	THE COMMISSION MUST UPDATE ITS LOCAL RADIO OWNERSHIP RULE TO ACCURATELY REFLECT TODAY'S BROADER MEDIA MARKETPLACE	30
	A. Continuing to Define the Relevant Market in a Manner that Ignores the Vast Majority of Outlets and Platforms Competing for Consumer Attention and Advertising Dollars Will Only Harm Broadcast Radio and Its Audiences	31
	B. NAB's Proposal Takes Account of the Needs of Both AM and FM Radio.....	49
IV.	THE RECORD DEMONSTRATES THAT THE CURRENT LOCAL TV RULE IS NO LONGER JUSTIFIED	56
	A. The Record Shows that the FCC Must Update its Market Definition Due to Fierce Competition between Local TV Stations and Myriad Multichannel and Digital Outlets for Audiences and Advertisers	56
	B. The Commission Should Disregard the Pay TV Industry's Self-Serving Calls to Further Restrict Local TV Ownership.....	64
V.	THE FCC MAY NOT EXTEND THE CABLE PROCUREMENT TO BROADCASTING	76
VI.	CONCLUSION.....	80

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I. INTRODUCTION AND SUMMARY

“Backward” (adverb) – “in the reverse of the usual or right way”¹

The comments submitted by those parties opposing reform of the FCC’s local radio and TV ownership rules are fundamentally backward. Commenters decrying relaxation of the ownership restrictions, for example, argue that the Commission, in reviewing its radio rules, would be failing to act in the public interest if it focused on competition among audio delivery platforms for advertising dollars and audiences. To the contrary, that should be the precise focus of the FCC’s review of its radio caps, and commenters such as these have it exactly backward. If broadcast stations cannot successfully compete against other audio and video delivery platforms for audiences and, thus, advertising dollars, they will not earn revenues needed to cover their substantial fixed costs and will be unable to serve listeners and viewers effectively, let alone improve their programming and technical facilities.

Similarly, other parties insist that broadcast media, especially TV, are critical for providing local communities with news and information, or even for maintaining democracy,

¹ <https://www.dictionary.com>

but then chastise the FCC for denigrating those values by focusing on economic concerns. This, again, is backward. The broadcast “industry’s ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”² These parties fail to explain how imposing ownership restrictions only on local broadcast stations in today’s competitive marketplace promotes their “economic viability” and, thus, their ability to serve the public.

Perhaps most significantly, commenters opposing alteration of the rules interpret Section 202(h) “in the reverse of the usual or right way.” A remarkable number of commenters ignore Section 202(h) entirely, while others selectively cite its terms, leaving out the word “competition.”³ These parties urge the FCC to deemphasize competition in its review, contrary to statutory mandate, congressional intent in the 1996 Act, judicial precedent and previous quadrennial review decisions. Particularly given the vastly increased competition in the modern digital marketplace, placing competition at the rear of relevant considerations in this proceeding clearly would be backward.

Looking at Section 202(h) in the correct way, the FCC’s primary focus in this proceeding should be on the intense and growing competition radio and TV stations face for audiences and advertising revenue in a broad marketplace with myriad content sources and advertising options. Due to these profound changes, the current local radio and TV ownership rules are no longer “necessary in the public interest as the result of competition,” and Section 202(h) requires the Commission to “repeal or modify” them.⁴

² *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992).

³ See Section 202(h), Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (1996 Act).

⁴ Section 202(h), 1996 Act.

As discussed in detail below, the record here provides more than sufficient information and empirical evidence for the FCC to adopt the National Association of Broadcaster's proposals.⁵ As multiple commenters, including NAB, demonstrated in comments and studies,⁶ radio stations are experiencing declines in audiences due to fierce competition, especially from online options, and significant revenue reductions in local ad markets increasingly dominated by digital platforms. Stations in smaller markets with limited advertising bases especially struggle to generate adequate revenue to cover their fixed costs, and AM stations face special competitive problems in all markets. If the FCC determines to retain broadcast-only ownership caps, it should permit radio broadcasters to achieve increased economies of scale by (1) removing caps on AM ownership; (2) allowing a single entity to own up to eight commercial FM stations in Nielsen markets 1-75 (with the opportunity to own up to ten FMs by participating in the FCC's incubator program); and (3) imposing no restrictions on FM ownership in markets 76 and lower and in unrated markets. NAB's proposal accurately reflects the competitive environment for local radio broadcasters.

The record similarly shows that market competition had led to substantial drops in TV stations' viewership and advertising revenues and that smaller market stations face special competitive challenges.⁷ Given the scale and concentration of TV stations' competitors, NAB again urges the FCC to eliminate the *per se* restrictions that ban combinations among top-

⁵ The National Association of Broadcasters (NAB) is a nonprofit 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.

⁶ See, e.g., Comments of National Association of Broadcasters, MB Docket Nos. 18-349, 17-289, at 6-42 (Apr. 29, 2019) (NAB Comments) and Attachment A, BIA Advisory Services, *Local Radio Station Viability in the New Media Marketplace* (Apr. 19, 2019) (BIA Radio Study).

⁷ See, e.g., NAB Comments at 43-85 and Attachment B, BIA Advisory Services, *The Economic Irrationality of the Top Four-4 Restriction* (Mar. 15, 2019) (BIA TV Study).

four rated stations and that prevent ownership of more than two stations in all markets, regardless of local competitive conditions or stations' audience or ad revenue shares. Moreover, NAB and other commenters provided analyses of the substantial revenue and ratings gaps between stations ranked in the top four in their local markets that demonstrate the irrationality of the *per se* ban.

Those parties opposed to reform of the outdated local radio and TV rules present no legal, factual or even logical arguments that undermine NAB's proposals. Most notably, these commenters offer no serious analyses – and provide virtually no relevant data – relating to competition for audiences and vital advertising revenues, even though free, over-the-air (OTA) broadcast stations depend on ad dollars for their very survival. Perhaps those parties against reform of the rules felt compelled to act as proverbial ostriches with their collective heads in the sand. After all, if they looked at the current market with their eyes open, they would be forced to recognize that radio and TV broadcasters compete against myriad multichannel and online audio and video sources and that the relevant market for evaluating ownership regulations can no longer be limited just to broadcast stations. And in that case, of course, the existing broadcast-only ownership rules would need to be repealed or modified. But whatever the reason for their failures to meaningfully address the central issues in this proceeding, the FCC should pay little heed to commenters whose submissions opposing reform amount to little more than opinion pieces (or quotes from other people's opinion pieces).

Ironically, retaining the ownership rules unaltered will not promote the professed goals of those opposing any change. Maintaining strict ownership limits has not in the past, and will not in the future, successfully promote diversity of station ownership or programming diversity. NAB and other commenters firmly believe that addressing the lack of

access to capital remains the only effective way to promote new entry into broadcasting. Moreover, retention of the existing rules will not foster, but will instead hinder, the provision of local news programming, given the resources needed to maintain local news operations, especially in smaller markets where stations most struggle to earn advertising revenues to support local programming production. Finally, it borders on the absurd to contend that broadcast-only restrictions are needed to promote diverse viewpoints in the internet age.

In reviewing the radio rules specifically, NAB urges the Commission to take account of the needs of both AM and FM radio. While several commenters contend that loosening or removing the FM subcaps will devalue AM stations, no aspects of NAB's proposal would require, or even directly encourage, radio broadcasters to sell their AM stations, particularly given that AM ownership would no longer "count" against any overall market cap. It also would be inappropriate for the FCC to maintain competitively unnecessary ownership subcaps to essentially coerce broadcasters into acquiring or retaining one type of radio outlet over another. The appropriate focus here is the ability of the radio station industry overall to compete successfully and serve consumers effectively. As the BIA Radio Study and the detailed comments of numerous radio broadcasters make clear, all radio stations, including FM, need to achieve greater economies of scale. The FCC should not reject much-needed FM ownership relief, especially in smaller markets, based on speculation about reduced demand for AM stations. That would be the regulatory equivalent of cutting off radio's nose to spite its face. NAB urges the FCC to foster the success of the AM service in ways other than retaining artificial restrictions on station ownership.

Finally, it is telling that the pay TV industry leads the opposition to reforming the local TV rule. The pay TV interests' tired complaints about retransmission consent have not improved with age and repetition, and the FCC should disregard their self-serving and

factually inaccurate arguments. Rather than ensuring that the viewing public is served by strong local TV stations, pay TV providers' proposals are designed to weaken their competition for viewers and advertising dollars and gain an even greater advantage in retransmission consent negotiations. Their proposals to make the local TV rule and top-four ban more restrictive at a time when competition in the video marketplace has reached unprecedented levels must be summarily rejected.

In short, NAB urges the Commission to rely on the data and empirical evidence submitted in this proceeding about competition in the broader media and advertising markets. Hyperbolic claims that broadcast deregulation will eliminate all diversity and all local news, or generalized complaints about media consolidation, provide no basis for retaining analog-era ownership rules. The FCC should discount the unsupported opinion and rhetoric submitted by parties wedded to a backward-looking approach to regulating radio and TV stations, and adopt rules reflecting competitive conditions in the 21st century.

II. THE FILINGS BY OPPONENTS OF OWNERSHIP REFORM EXHIBIT MYRIAD LEGAL, FACTUAL, EVIDENTIARY AND COMMON SENSE FAILINGS

A. Parties Decrying Any Reform Ignore or Misstate Applicable Legal Standards and FCC Precedent

Given that the current rulemaking is a quadrennial review mandated by Section 202(h) of the 1996 Act, a remarkable number of commenters opposing alteration of the current ownership rules fail to address that section and the obligations it imposes on the Commission. Numerous parties opposing ownership rule changes simply ignore the terms of

Section 202(h) altogether.⁸ Others selectively cite that section, often choosing to leave out any mention of “competition.”⁹

Unsurprisingly, the record is replete with comments failing to demonstrate how maintaining the current ownership rules satisfies the FCC’s legal duties to “determine whether any of such rules are necessary in the public interest as *the result of competition*” and, then, “to repeal or modify any rule its determines to be no longer in the public interest.”¹⁰ “Indeed, the very purpose of § 202(h) [is] to function as an ‘ongoing mechanism

⁸ See Comments of King City Communications Corp., MB Docket No. 18-349 (Apr. 29, 2019) (King City Comments); Comments of Bristol County Broadcasting, Inc./SNE Broadcasting, Ltd., MB Docket No. 18-349 (Apr. 29, 2019) (Bristol County Comments); Comments of Urban One, Inc., MB Docket No. 18-349 (Apr. 29, 2019) (Urban One Comments); Comments of Ride Television Network, *et al.*, MB Docket No. 18-349 (Apr. 29, 2019) (Ride TV Comments); Comments of Mount Wilson FM Broadcasters, Inc., MB Docket No. 18-349 (Apr. 25, 2019) (Mount Wilson Comments); Comments of Salem Media Group, MB Docket No. 18-349 (Apr. 29, 2019) (Salem Comments); Comments of Crawford Broadcasting Co., MB Docket No. 18-349 (Apr. 26, 2019) (Crawford Comments); Comments of CRC Broadcasting Company, Inc., MB Docket No. 18-349 (Feb. 7, 2019) (CRC Comments); Comments of the National Association of Black Owned Broadcasters, Inc., MB Docket No. 18-349 (Apr. 29, 2019) (NABOB Comments); Comments of Free Press, MB Docket No. 18-349 (Apr. 29, 2019) (Free Press Comments).

⁹ See Comments of the National Hispanic Media Coalition, *et al.*, MB Docket No. 18-349, at 17 (Apr. 29, 2019) (NHMC Comments) (making no reference to the word “competition” in their discussion of § 202(h)’s standard); Comments of the American Television Alliance, MB Docket No. 18-349, at 5 (Apr. 29, 2019) (ATVA Comments) (leaving out any mention of the word “competition” when describing the FCC’s obligations under § 202(h)); Joint Comment of musicFIRST Coalition and Future of Music Coalition, MB Docket No. 18-349, at 3 (Apr. 29, 2019) (musicFIRST Comments) (describing the analysis required of the FCC under § 202(h) as whether the broadcast ownership regulations are necessary in the public interest).

¹⁰ Section 202(h) (emphasis added) (also directing the FCC to review its ownership rules quadrennially “as part of its regulatory reform review under section 11 of the Communications Act of 1934”). Section 202(h)’s focus on competition is reinforced by its reference to Section 11, which requires the FCC to periodically review regulations applicable to the operations and activities of telecommunications providers to determine whether such regulations are “no longer necessary in the public interest as *the result of meaningful economic competition*.” 47 U.S.C. § 161 (emphasis added). In enacting the 1996 Act, Congress sought “to preserve and to promote the *competitiveness* of over-the-air broadcast stations”; it found that marketplace changes “call[ed] for a substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and

to ensure that the Commission’s regulatory framework would keep pace with the *competitive changes in the marketplace.*”¹¹ In light of the statute governing this proceeding, Congress’ intent in the 1996 Act and court precedent, comments ignoring the language of Section 202(h) and competitive changes in the marketplace do not adequately respond to the Notice or meaningfully inform the FCC’s considerations here.¹²

In its quadrennial reviews, moreover, the Commission has found that the “primary purpose” of the local TV rule is to promote competition,¹³ and consistently referred to the local radio ownership rule as “competition-based.”¹⁴ In addition, the FCC (1) has “never

competes”; it stated that to ensure the broadcast “industry’s ability to *compete* effectively,” Congress and the FCC needed to reform federal policy and the current regulatory framework to reflect new marketplace realities; and it found that, in a “*competitive* environment, arbitrary limitations on broadcast ownership” were no longer necessary. H.R. Rep. No. 104-204, at 48, 55 (1995) (emphases added). Indeed, Section V. of this House report is entitled “Broadcast Communications *Competitiveness.*” *Id.* at 54 (emphasis added).

¹¹ *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (quoting *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004) (*Prometheus I*) (emphasis added)); see also *Prometheus I*, 373 F.3d at 391 (observing that § 202(h) recognizes that “*competitive changes in the media marketplace* could obviate the public necessity” for some of the FCC’s ownership rules) (emphasis added).

¹² See *2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, MB Docket No. 18-349, FCC 18-179, at ¶ 14 (Dec. 13, 2018) (Notice) (seeking comment on whether the current radio rule “remains necessary in the public interest as the result of competition”); ¶ 15 (stating that, in the event it determines to retain the radio rule, the FCC will “examine whether each particular part” of the rule “remains necessary in the public interest as a result of competition or whether it should be modified or eliminated”); at ¶ 43 (seeking comment on whether the current TV rule “is necessary in the public interest as a result of competition”).

¹³ *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864, 9887 (2016) (2016 Ownership Order); see also NAB Comments at 57-59 (discussing in detail the FCC’s previous decisions about the local TV rule and its purpose).

¹⁴ 2016 Ownership Order, 31 FCC Rcd at 9899; *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2078 (2008) (2008 Ownership Order); *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13739 (2003) (2003 Ownership Order).

found that the local radio ownership rule significantly advances our interest in localism”;¹⁵ (2) has “declined to rely on format diversity” to justify that rule;¹⁶ and (3) has found that, while radio broadcasting is not “irrelevant to viewpoint diversity,” media “other than radio play an important role in the dissemination of local news and public affairs information,” and, in any event, its “competition-based limits” on radio ownership promote viewpoint diversity.¹⁷

Given this precedent, the terms of Section 202(h) and clear congressional intent, arguments by some commenters that the Commission now should reverse course, deemphasize competition and review its radio limits with other goals primarily in mind are wholly unconvincing.¹⁸ Particularly in light of the vastly increased competition among media outlets in the current marketplace, it would be arbitrary and capricious for the FCC to

¹⁵ 2008 Ownership Order, 23 FCC Rcd at 2075; *accord* 2003 Ownership Order, 18 FCC Rcd at 13738 (concluding that “we see little to indicate that the local radio ownership rule significantly advances our interest in localism,” noting that the FCC had not previously emphasized localism as one of its justifications for the radio rule, and finding that the record suggested no reason for adopting a different view).

¹⁶ 2008 Ownership Order, 23 FCC Rcd at 2077; *accord* 2003 Ownership Order, 18 FCC Rcd at 13742.

¹⁷ 2003 Ownership Order, 18 FCC Rcd at 13739; *accord* 2008 Ownership Order, 23 FCC Rcd at 2077; see *also* 2016 Ownership Order, 31 FCC Rcd at 9898-99 & n. 238 (stating that the FCC is not relying on its other goals, *i.e.*, localism, viewpoint diversity or program diversity, as a basis for retaining the local radio rule).

¹⁸ See musicFIRST Comments at i, 6 (objecting to reviewing the local radio caps primarily through the lens of competition and arguing that the reviews should be focused on promoting the FCC’s public interest obligations of “diversity, localism, and competition”); see *also* UrbanOne Comments at 5-9 (arguing that the radio rules should promote ownership diversity, especially by minority owners, as a “primary goal” and program diversity as a “complementary goal”). As discussed in Section II.C.1., structural ownership rules were not designed to and do not effectively promote ownership of stations by members of minority groups or women. Thus, the FCC appropriately has not made fostering minority and female ownership a primary goal of its ownership rules. Extensive evidence, moreover, shows that common ownership of radio stations promotes programming format diversity. See Section III.A.3., *infra*.

suddenly redefine the primary purpose of its local radio or TV rule.¹⁹ The Commission also should discount the comments of parties in this proceeding who have reversed their own course regarding the purposes of the local ownership rules and the proper application of Section 202(h).²⁰ Placing competition at the rear of relevant considerations in this review would be precisely backward.

B. Commenters Against Modernization of the Rules Fail to Recognize Basic Economic Truths, Resulting in Illogical, Unsupported and Unsupportable Arguments

Given that so many commenters took no (or selective) notice of Section 202(h), it is perhaps unsurprising that the opponents of updated ownership rules failed to engage in serious analyses of the competition for audiences and advertising revenue in today's digital marketplace. A notable number of commenters avoided any real discussion supported by data – and in some cases any mention whatsoever – of the larger advertising market, which undermines their opposition to updated local ownership rules.²¹

¹⁹ See, e.g., *Comcast Corp. v. FCC*, 579 F.3d 1, 7-8 (D.C. Cir. 2009) (finding cable ownership rule arbitrary and capricious because FCC did not account for competitive impact of satellite and fiber optic companies, despite record evidence of increasing competition among these video providers); see also NAB Comments at 57-59 (explaining why it would be arbitrary and capricious for the FCC to now replace its competition-based rationale for the local TV rule).

²⁰ For example, iHeart previously declared the Commission had been “correct to conclude” that limiting the number of radio stations a single entity may own in a local market did “not further [the FCC’s] interests in either diversity or localism.” Comments of Clear Channel Commc’n, Inc., MB Docket No. 06-121, *et al.*, at 17-18 (Oct. 23, 2006) (Clear Channel 2006 Comments) (characterizing the FCC’s 2003 Ownership Order); see also Comments of Clear Channel Commc’n, Inc., MB Docket No. 09-182, at 2 (July 12, 2010) (Clear Channel 2010 Comments) (“Congress intended for Section 202(h) to be an engine that would drive deregulation of the broadcast industry.”). In this review, however, iHeart declared that in applying Section 202(h), the FCC has “consistently considered” competition, “localism and viewpoint diversity, as well as the policy goal of promoting minority and female ownership.” Comments of iHeart Commc’n, Inc., MB Docket No. 18-349, at 3 (Apr. 29, 2019) (iHeart Comments).

²¹ See, e.g., musicFIRST Comments; ATVA Comments; Free Press Comments; NHMC Comments; Comments of Leadership Conference on Civil and Human Rights, MB Docket No.

After all, broadcast radio stations are almost wholly dependent on advertising revenue to keep their lights on, let alone invest in programming and their technical facilities, and despite many TV stations obtaining retransmission consent revenues, television “broadcasters continue to derive revenues primarily by selling time to advertisers.”²² These commenting parties either do not know – or do not care – how the combination of a slower growing advertising market and the loss of local ad market share and revenues to online, mobile and multichannel platforms have placed significant financial stress on free OTA broadcast services, especially in smaller markets with much more limited advertising bases.²³ While a few parties generally state that the radio industry is “healthy” or that the broadcast TV industry is “thriving,” those commenters cite no or very limited evidence, e.g., the press releases of a half dozen TV station companies (including a financially struggling one formerly in bankruptcy), to support their incomplete and misleading assertions.²⁴

Beyond their abject failure to support their position with convincing (or, in some cases, any) evidence about marketplace competition, those commenters opposing any

18-349 (Apr. 29, 2019) (Leadership Conference Comments); Comments of the Multicultural Media, Telecom and Internet Council, MB Docket No. 18-349 (Apr. 28, 2019) (MMTC Comments); Comments of NCTA – The Internet & Television Ass’n, MB Docket No. 18-349 (Apr. 29, 2019) (NCTA Comments); King City Comments; Bristol County Comments; Urban One Comments; Mount Wilson Comments; Salem Comments; Crawford Comments; CRC Comments; NABOB Comments.

²² *Communications Marketplace Report*, GN Docket Nos. 18-231, et al., FCC 18-181, at ¶ 91 (Dec. 26, 2018).

²³ See NAB Comments at 20-26, 50-54, 70-71 & Attachments F, G (discussing in detail and providing substantial data about the fundamental changes in the advertising marketplace and their effect on radio and TV stations, particularly in mid-sized and small markets).

²⁴ See Crawford Comments at 1 (stating without any data that the radio industry “is generally healthy”); Ride TV Comments at 2-3 (asserting that the TV industry “is thriving” and “earning more revenue and achieving greater financial performance than ever before,” relying on six press releases). In contrast, NAB provided substantial evidence of radio and TV stations’ declining advertising revenues and local market ad revenue shares. See NAB Comments at 20-25; 50-54; BIA Radio Study at 10-12; BIA TV Study at 12, 16-17.

relaxation of the ownership rules more importantly fail to make the fundamental connection between the ability of free OTA broadcast stations to compete successfully for vital advertising revenues and their ability to offer high-quality entertainment and informational programming to their local communities. For example, musicFIRST argues that the FCC would be “abdicat[ing] its requirement to act in the public interest” of radio listeners if it focused its review primarily through the “lens of competition among audio delivery platforms for advertising dollars and audience.”²⁵ To the contrary, this is precisely the lens through which the FCC, under Section 202(h), should view its local radio limits, and musicFIRST has it exactly backward. If radio stations cannot successfully compete against other media platforms for audiences and, thus, for advertising dollars, they will not earn ad revenues sufficient to cover their substantial fixed costs and will be unable to serve their local communities adequately, let alone improve their programming and technical facilities.²⁶

Similarly, Free Press lauds broadcast media as “critical for maintaining our democracy, for promoting free speech and ideas, and for serving local communities with the civic information they need,” while at the same time chastising the FCC for “[d]enigrating these benefits” by focusing on “economic concerns.”²⁷ If Free Press truly believes what it says here about the importance of broadcast media,²⁸ then it should realize that the FCC’s

²⁵ musicFIRST Comments at 6.

²⁶ As the BIA Radio Study (at 31-33) explained, radio stations that struggle to cover their fixed costs (e.g., engineering, programming, advertising and promotion, sales and general/administrative) are unable to invest in improving their stations’ programming or physical plant or hire additional staff; see *also id.* at 34 (showing the high percentages of “unconstrained” stations, especially in smaller markets, that earn revenue levels below the thresholds needed to cover their fixed costs).

²⁷ Free Press Comments at 14.

²⁸ Free Press’ view of the virtues of broadcasting appears situational. In FCC ownership proceedings, it extols broadcast media as essential for democracy, free speech and local communities, but elsewhere accuses the broadcast media of “undermining democracy” by

focus on “economic concerns” is entirely appropriate. As the FCC has correctly recognized, the broadcast “industry’s ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”²⁹ Free Press fails to explain, let alone support with evidence, how imposing ownership restrictions only on local stations in today’s competitive media and advertising markets promotes their “economic viability” and, thus, their ability to serve the public.

Other commenters present arguments similarly lacking in logic. NHMC and the Leadership Conference state that not all people in the U.S., especially communities of color, have access to broadband services and that they therefore rely on free OTA broadcasting.³⁰ NAB does not dispute this fact, but we strongly dispute the conclusions these commenters draw from it, for several reasons.

First, NHMC and the Leadership Conference merely assume, without real explanation or evidentiary support, that because some Americans lack reliable high speed internet access and depend more than others on TV and radio stations, then the FCC should not alter its broadcast ownership restrictions. Their reasoning is backward. It is *more* important for viewers and listeners dependent on broadcast services that the Commission ensures its ownership rules allow local broadcasters to achieve the economies of scale needed for them to compete successfully for the audiences and advertising revenues that support quality, free OTA services. NHMC, for example, shows the illogic of its position by stating that broadcast TV programming is essential for American children because it “remains uniquely

“polluting political discourse and failing to cover important issues.” Timothy Karr, *Free Press, New Report Shows Big-Money Politics and Broadcast Media Are Undermining Democracy* (Jan. 26, 2012).

²⁹ *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992).

³⁰ NHMC Comments at 9-12; Leadership Conference Comments at 7-8.

pervasive and accessible,” and then erroneously assuming that this statement supports retention of “strenuous media ownership rules.”³¹ The relaxation of the local TV rule would not alter FCC rules requiring licensed TV stations to provide free OTA programming streams and, thus, would not reduce the pervasiveness or accessibility of broadcast TV. And, as NAB showed in its comments, permitting TV station owners to form more competitively viable ownership structures is needed to ensure their continued ability to invest in their stations and provide quality programming, especially in smaller markets.³²

Second, the Commission should reject the implication that it can, under Section 202(h), or should, as a matter of policy, simply ignore the competing online audio and video services that most Americans have access to and increasingly utilize in place of local TV and radio stations.³³ According to Leichtman Research Group (LRG), at the end of 2018, 83 percent of U.S. households got an internet service at home, and 92 percent of all households accessed the internet either at home and/or on a smartphone, with the most common reason for not getting a home internet service being “a lack of perceived need (cited by 46%).”³⁴ Internet usage has spread over time and will continue to increase, given

³¹ NHMC Comments at 11-12.

³² The BIA TV Study (at 1-3) explained that, due to vastly increased competition for advertising revenues, many local TV stations (even those ranked among the top four in their markets) are struggling to continue, let alone increase, investments in programming, technology upgrades such as ATSC 3.0 and the data-driven and automated sales operations necessary to compete against online and mobile advertising platforms.

³³ See NAB Comments at 8-18, 44-49, BIA Radio Study at 3-9, BIA TV Study at 3-10 (documenting the declining audiences radio and TV stations attract, the rapid growth in consumers’ use of online audio and video options, and the explosion of devices that consumers utilize to listen and watch online content).

³⁴ LRG, *83% of U.S. Households Get an Internet Service at Home*, Press Release (Dec. 21, 2018). Cost was cited by 17 percent of those not getting an internet service at home, followed by 11 percent citing the ability to access the internet on a smartphone and nine percent citing availability issues.

that, according to a 2019 Pew Research Center survey, *zero percent* of U.S. adults ages 18-29, and only *three percent* of those ages 30-49, do not use the internet.³⁵

Large percentages of various demographic groups, moreover, utilize online audio and video options. Nielsen reported in 2018, for example, that 87 percent of Hispanics had streamed music over the past year, compared to 75 percent of the U.S. population as a whole (ages 13+).³⁶ As of September 2018, Nielsen also found that minority households had generally comparable (and in some cases greater) access to internet enabled TV-connected devices (e.g., enabled smart TVs, Apple TV, Roku, enabled game consoles, etc.) and subscription video on demand (SVOD) services than U.S. TV households as a whole.³⁷ And while NAB agrees that the problem of the digital divide needs to be addressed, the maintenance of restrictions on ownership of radio and TV stations does nothing to address that problem.

Finally, NAB observes that if the Commission could ignore or discount online audio and video services because they are not pervasive or universally accessed, then it could ignore broadcast TV as a competitor in the media marketplace. According to Nielsen, there are over 125 million (125,020,000) total households in the U.S., but less than 120 million

³⁵ M. Anderson, A. Perrin, J. Jiang and M. Kumar, *10% of Americans don't use the internet*, Pew Research Center (Apr. 22, 2019). This survey found that the “offline population” in the U.S. had declined from 48 percent of adults in 2000 to 10 percent today, although a digital divide still exists. Greater numbers of Black and Hispanic adults (15 and 14 percent, respectively) do not use the internet compared to Whites (eight percent).

³⁶ *Nielsen Music 360 2018 U.S. Report*, at 32 (Sept. 2018).

³⁷ Last September, 68 percent of U.S. TV households overall had at least one internet enabled TV-connected device, compared to 67 percent, 75 percent and 85 percent of Black, Hispanic and Asian-American TV households, respectively. Two-thirds of TV households overall subscribed to an SVOD service, compared to 60 percent, 70 percent and 80 percent of Black, Hispanic and Asian-American TV households, respectively. *The Nielsen Total Audience Report Q3 2018*, at 17 (2019).

(119,900,000) total TV households, which, significantly, includes broadband-connected households that do not access television over-the-air or via cable/satellite. Today, just over 110 million (110,244,650) “traditional” TV households (or about 88.2 percent of all U.S. households) can access television via an OTA source or cable/satellite (and many of these households also access video via the internet).³⁸ Thus, broadcast TV is not pervasive. Over five million U.S. households (5,120,000) are not TV households at all.³⁹ Nearly ten million (9,655,350) additional households receive video from internet sources only and do *not* receive broadcast stations OTA or via cable/satellite (and thus their viewing of broadcast TV programming is minimal, at best). According to Nielsen, moreover, live+time shifted TV (including broadcast and cable/satellite) reached only 86 percent of U.S. adults ages 18+ in an average week in the third quarter of 2018.⁴⁰ As well as showing that broadcast TV is not pervasive, these data show that online video services compete with – indeed, have essentially replaced – broadcast (and cable) TV in millions of households.

For all these reasons, the Commission must reject the flawed logic of those commenters contending that the broadcast-only ownership restrictions should remain unchanged because broadband subscriptions, internet access and/or usage of online audio and video services are not universal. As NAB previously explained, Section 202(h) requires the FCC to reform its ownership rules “as the result of competition” before competitors have

³⁸ See Nielsen, 2018-2019 TV Household Universe Estimates.

³⁹ A TV household is a household with at least one operable TV set that can receive audio and video from at least one channel through cable, satellite, an OTA source or streaming video from an internet source. A household is not a TV household if it is without a TV set, or if it has a TV set that is not connected in one of the four ways listed above (cable, satellite, OTA source or an internet source). Nielsen, TV Household Definition, 2018-2019 Final National TV Household Universe Estimates (Aug. 23, 2018).

⁴⁰ *The Nielsen Total Audience Report Q3 2018*, at 13 (2019).

completely replaced broadcast stations.⁴¹ It would be contrary to Section 202(h) and arbitrary and capricious for the FCC to discount in this proceeding the myriad audio and video options made possible by the internet, “America’s most important platform for economic growth, innovation, competition [and] free expression.”⁴²

C. Parties’ Opposition to Any Alterations in the Ownership Rules Will Not Promote and Will Likely Harm Their Professed Goals

1. Maintaining Broadcast-Only Ownership Restrictions Has Not in the Past and Will Not in the Future Promote Diversity of Station Ownership

Several broadcasters urge the Commission to retain the existing ownership rules unchanged on the assumption, either explicit or implicit, that these restrictions foster ownership of stations by minorities and women.⁴³ But these commenters do not present any evidence showing that structural ownership restrictions have in the past, or likely will in the future, effectively promote ownership by women and people of color.

Available evidence in fact indicates that structural ownership rules have done little or nothing to promote this type of diverse broadcast station ownership, which, after all, was not their intended purpose.⁴⁴ The Commission first adopted strict local and national limits on ownership of AM, FM and TV stations in the 1940s. By the mid-1970s, the FCC’s rules: (1)

⁴¹ See NAB Comments at 28-29, 56-57.

⁴² *Protecting and Policing the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5563 (2014).

⁴³ See, e.g., NABOB Comments at 1-2; Leadership Conference Comments at 8-10; NHMC Comments at 16-19; Free Press Comments at 15-16; Urban One Comments at 5-8.

⁴⁴ In its first ownership review following the 1996 Act, the Commission stated that “[f]or more than half a century,” the FCC’s regulation of broadcast ownership has been “guided by the goals of promoting competition and diversity,” particularly “diversity of viewpoints.” *1998 Biennial Regulatory Review*, Notice of Inquiry, 13 FCC Rcd 11276, 11277 (1998). Starting with its 2002 review, the FCC added localism as another goal of its ownership rules. See *2002 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, 18526-27 (2002) (requesting comment on whether, and to what extent, localism “is related to ownership limits”).

set the national TV cap at seven stations; (2) prohibited the common ownership of more than one TV station in the same local market; (3) banned the common ownership of a newspaper and even a single radio or TV station in the same market; (4) prohibited common ownership of a radio station (or an AM/FM combo) and a single TV station in the same market; (5) banned the common ownership of a cable TV system and a broadcast TV station in the same area; (6) set the national radio cap at seven AM and seven FM stations; and (7) prohibited common ownership of more than one radio station in the same service in the same local market.

Yet despite decades of severe ownership restrictions, the FCC reported in 1978 that minorities “control[led] fewer than *one percent*” of the commercial radio and TV stations in the U.S.⁴⁵ – a figure noticeably lower than today, when ownership limits are looser.⁴⁶ And directly contrary to commenters’ belief that stricter ownership rules better foster diverse ownership, the FCC found in the last quadrennial review that minority ownership of radio stations grew after the 1996 Act and that minority ownership of TV stations increased following the modest loosening of the local TV rule in 1999.⁴⁷

As NAB previously discussed,⁴⁸ maintaining structural ownership limits fails to promote new entry into broadcasting because those limits do not address the primary

⁴⁵ *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978) (emphasis in original) (Minority Ownership Policy Statement).

⁴⁶ In late 2015, ethnic and racial minorities owned 7.1 percent of all full-power commercial TV stations, 10.8 percent of commercial AM and 6.5 percent of commercial FM stations. *Third Report on Ownership of Commercial Broadcast Stations*, at 6-7, 12-15 (Med Bur. May 2017). Minorities owned 15.2 percent and 15.8 percent, respectively, of all Class A and LPTV stations in 2015. *Id.* at 9-11.

⁴⁷ See 2016 Ownership Order, 31 FCC Rcd at 9895, 9911-12 (citing data from NTIA, FCC and Free Press).

⁴⁸ See, e.g., Reply Comments of NAB, MB Docket No. 17-318, at 23-24 (Apr. 18, 2018).

obstacle facing new entrants, particularly minorities and women – a lack of access to capital.⁴⁹ As one very small broadcaster explained here, the “real issue hurting the [radio] industry today – especially independent and minority ownership – is the collapse of the conventional sources of capital that used to fund start-ups and acquisitions.”⁵⁰ NAB therefore has in the past and continues today to support practical measures and programs fostering new entry, especially those attempting to remedy the lack of access to capital.⁵¹

In contrast, certain commenters in this proceeding who claim to care about diversity continue to support structural ownership rules that demonstrably do not advance diverse station ownership, while failing to offer constructive proposals of their own and even opposing FCC efforts to promote new entry by addressing the access to capital problem.⁵² These commenters’ approach is counterproductive, to put it mildly. Commenters in previous quadrennial reviews and in this proceeding have explained that ownership restrictions

⁴⁹ *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).

⁵⁰ Reply Comments of Grant Co. Broadcasters Inc., MB Docket No. 18-349, at 1-2 (May 13, 2019) (Grant Co. Reply Comments).

⁵¹ See, e.g., Comments of NAB, MB Docket Nos. 17-289, *et al.* (Mar. 9, 2018) (providing recommendations for the elements of an incubator program and describing NAB diversity initiatives). In fact, in 1978, the FCC adopted a tax certificate program similar to one NAB had previously proposed. See *Minority Ownership Policy Statement*, 68 FCC 2d at 983. Virtually all stakeholders agree that this tax certificate program, which Congress ended in 1995, effectively increased broadcast ownership diversity, and numerous parties, including NAB, continue to call for reinstatement of such a program. Congress, however, has shown little inclination to reinstate it.

⁵² See, e.g., Comments of Office of Communication, Inc. of the United Church of Christ (UCC), *et al.*, MB Docket Nos. 17-289, *et al.*, at 3-4 (Mar. 9, 2018) (questioning the FCC’s decision to create an incubator program and saying it was “pointless” to answer the FCC’s questions about how to design the program); Letter of Free Press, MB Docket Nos. 17-289, *et al.* at 2 (Mar. 9, 2018) (calling the FCC’s incubator proposal “irresponsible,” but making no suggestions for improving it or otherwise addressing new entrants’ lack of access to capital).

artificially depress the value of broadcast stations, thus devaluing the assets and the borrowing capability of minority and female station owners and other small, independent broadcasters, and making it more difficult for new entrants to obtain financing to acquire devalued stations.⁵³ For all these reasons, commenters opposing any changes to the broadcast ownership rules because they supposedly foster diverse station ownership have presented no sound basis for the Commission to refrain from reforming its local radio and TV ownership rules.

2. Retaining the Existing Ownership Rules Will Not Effectively Promote, and Will Very Likely Hinder, the Provision of Local Programming, Including News, and Are Not Needed to Promote Diverse Viewpoints in the Internet Age

“[D]eregulating local radio ownership will eliminate all diversity and all local news and programming”⁵⁴

The Commission should relegate to the dust bin comments making such doom-laden and hyperbolic claims about the evils of updating analog-era radio and TV ownership rules. Other commenters similarly offer rhetoric about “runaway” media concentration and “massive broadcast consolidation” and assume, without any or with only minimal

⁵³ See Reply Comments of The Center for Regulatory Effectiveness (CRE), MB Docket Nos. 06-121, *et al.*, at 2-3 (Oct. 25, 2007); Grant Co. Reply Comments at 2 (also stating that retention of the current radio caps will only “make things worse”); see *also* Letter of Dick Broadcasting Co. Inc., MB Docket No. 18-349, at 2 (Apr. 9, 2019) (Dick Broadcasting Letter) (explaining that relaxing the radio ownership rules would “send a message to the lending community that there will now be stability and scale in the industry” and “justification to lend again to broadcasters, including minority broadcasters and new entrants”); Grant Co. Reply Comments at 2 (stating that ownership deregulation will help convince sources of capital that the radio industry is safe to invest in and that is the only way “to get back the ability to finance smaller transactions”).

⁵⁴ Leadership Conference Comments at 6 (emphasis added).

explanation or evidence, that changes to the ownership rules will automatically result in significant declines in the provision of local news and reductions in viewpoint diversity.⁵⁵

NAB previously explained that broadcast stations have strong incentives to offer locally-oriented content, including news, which helps them stand out in a crowded media landscape, thereby maximizing their audiences and, ultimately, their advertising revenues.⁵⁶ Thus, commenters' claims that broadcasters will have diminished or no incentives to offer local news or other locally-based programming if the FCC changes the ownership restrictions are erroneous. Their argument is also nonsensical, as these parties do not explain how the numerical ownership limits – rather than other FCC rules and policies under the Communications Act requiring stations to serve their communities of license – actually incentivize broadcast stations to provide locally-responsive content now or why changing the ownership caps would reduce those incentives.⁵⁷ In fact, the current ownership restrictions do not incentivize the production and airing of locally-oriented content but impede it.⁵⁸

⁵⁵ Free Press Comments at 6-7, 9-10; see also Leadership Conference Comments at 8 (claiming without any evidence and virtually no explanation that each ownership rule is “essential to the ability of local communities to access sources of news and information”); Ride TV Comments at 9-10 (claiming without evidence that elimination of the top-four rule would harm viewpoint diversity); NHMC Comments at 9-12 (assuming that households dependent on free OTA broadcasting will be harmed by reform of the ownership rules but failing to explain precisely how they will be harmed or what specific harms will actually result from rule changes).

⁵⁶ See NAB Comments at 59-60; *accord* Comments of Nexstar Broadcasting, Inc., MB Docket No. 18-349, at 10-11 (Apr. 29, 2019) (Nexstar Comments).

⁵⁷ See Leadership Conference Comments at 6-7; Free Press Comments at 10; Ride TV Comments at 10; musicFIRST Comments at 14-19. While other parties focus their localism fears on TV news, musicFIRST claims that the radio caps are needed to protect localism, despite the FCC having “never found” that its local radio rule “significantly advances” its “interest in localism.” 2008 Ownership Order, 23 FCC Rcd at 2071.

⁵⁸ As NAB’s initial comments explained in detail, citing numerous relevant studies, more freely permitting common ownership of TV stations in the same market allows broadcasters to take advantage of *prima facie* welfare enhancing economies of scale and leads to increased investment in news programming. NAB Comments at 60-62; see also BIA Radio

The results of the recently released 2019 RTDNA/Hofstra University Newsroom survey also refute the claims of commenters like Free Press, which contends, for example, that “newsrooms’ worth of local reporters” have lost their jobs due to consolidation.⁵⁹ The RTDNA survey found that, in 2018, local TV news reached the second highest total full-time employment in the 25-year history of the survey at 27,800 employees, just below the all-time peak in 2009.⁶⁰ Local TV news salaries, moreover, rose on par with average U.S. wages overall in the past year, and the “long-term salary picture looks better than ever for local TV news,” surpassing inflation over the last five and ten years.⁶¹ The amount of local TV news also hit a new record high in 2018, with the average TV news station airing 5.9 hours of local news on weekdays and 2.2 hours of local news on Saturdays and Sundays.⁶² Contrary to the claims of Free Press, the changes that have occurred in the TV industry – rather than decimating newsrooms – has resulted in the employment of very near-record numbers of news staff who are compensated at above-inflation rate levels and who produce record amounts of local news programming.

Study at 30-31 (finding that reforming the radio caps, by allowing broadcasters to take advantage of scale efficiencies, would increase stations’ cash flow, with relatively greater benefit in smaller markets). Those parties opposing relaxation of the local ownership rules cite no economic studies and do not appear to recognize the concept of economies of scale.

⁵⁹ Free Press Comments at 9.

⁶⁰ Bob Papper, *Local TV News Employment Gains . . . Near All-Time High*, 2019 RTDNA/Hofstra University Newsroom Survey (May 15, 2019) (reporting that total local TV news employment rose 2.6 percent over the previous year). Stations in larger markets with greater resources, especially the top-50 markets, employ higher numbers of news staff. In 2018, the average news station in markets 1-25 employed 68.7 full-time news staffers, while the average station in markets 151+ employed 19.6 full-time news personnel.

⁶¹ Bob Papper, *Local News Salaries* (Apr. 3, 2019).

⁶² Bob Papper, *A Shocking Development: A Small Increase in Local TV Newsrooms . . . and a Record Amount of Local News* (May 15, 2019). As usual, stations in larger markets with more resources and staff aired higher amounts of local news.

RTDNA's annual surveys also show the economic pressures on local TV news operations. These surveys inquire about the profitability of stations' local TV news, which is directly relevant to the ultimate viability of local news operations and their service to the public. In 1996, 72 percent of TV stations reported that their local news operations were profitable – the highest percentage reported in the 25-year history of the RTDNA surveys.⁶³ By the mid-2000s, only about 45 percent of stations showed a profit on their local news, but over the past five years, about 60 percent of stations reported profitable local news operations.⁶⁴ These data reflect the competition local TV stations face in the provision of news and information and the need for stations to form local combinations and engage in various joint arrangements, as a number of stations have done in smaller markets with limited advertising bases, to continue offering local news programming.⁶⁵ But even with the limited economies of scale that local TV broadcasters have been able to achieve, local news operations are not on as sound a financial footing as they were in the analog era.

RTDNA's 2019 report reconfirms that many radio stations in markets of all sizes struggle to make their local news programming financially viable.⁶⁶ Notably, local groups of

⁶³ Bob Papper, *The Business of News: TV* (May 15, 2019).

⁶⁴ *Id.* (reporting that only 44.5 percent and 47.8 percent of local news operations showed a profit in 2005 and 2010, respectively).

⁶⁵ Bob Papper, *A Shocking Development: A Small Increase in Local TV Newsrooms . . . and a Record Amount of Local News* (May 15, 2019). Today, 706 TV stations originate local news and provide news on another 363 stations, for a total of 1,069 stations airing local news. *Id.* Economic pressures over the past decade have increased the number of stations that provide news programming via arrangements with another station. As NAB previously documented, these joint arrangements have expanded or preserved existing local news operations and resulted in the initiation of local news programming on stations that previously did not air local news. See NAB *Ex Parte* Submission, MB Docket Nos. 09-182, at 3-15 (Mar. 21, 2014).

⁶⁶ See NAB Comments at 36; Bob Papper, *Radio News Profits Edge Down but Budgets Edge Up* (May 15, 2019) (according to responding news directors/general managers with

three or more stations are more likely to have profitable local news and less likely to show losses on their local news.⁶⁷ “The bigger the staff, the more news a station runs,” without exception;⁶⁸ thus, financially sound radio stations able to hire additional news staff will provide more local news to their communities. And despite those who lament consolidation in the radio industry as the death knell of localism,⁶⁹ RTDNA’s report found that the median radio news operation had the same full-time news staff size that it did 25 years ago, when these annual reports began.⁷⁰

Claims that loosening the radio and TV ownership limits will eliminate or materially reduce diversity should be similarly rejected.⁷¹ As NAB discussed in its initial comments, the FCC would need to clear a very high bar to justify broadcast-only ownership rules as necessary to ensure the availability of diverse viewpoints in the internet age, given that the glut of news, information and opinion Americans carry in the palms of their hands is more than anyone could digest.⁷²

knowledge of their stations’ finances, only 12.4 percent reported their stations earned a profit on news in 2018, consistent with profitability levels over the past five years).

⁶⁷ Papper, *Radio News Profits Edge Down*.

⁶⁸ Bob Papper, *Most Radio Stations Run Local News . . . and a Little More of It This Year* (May 15, 2019) (reporting that the average number of weekday minutes of news aired by radio stations went up overall by nine minutes in 2018).

⁶⁹ See, e.g., Leadership Conference Comments at 6; musicFIRST Comments at 16-19.

⁷⁰ 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 radio newsrooms in the survey.

⁷¹ See, e.g., Leadership Conference Comments at 6; Ride TV Comments at 9-10; Free Press Comments at 10.

⁷² See NAB Comments at 66. While NAB does not dispute that Americans still rely on broadcasters, especially TV stations, for local news and information, consumers increasingly turn to non-traditional outlets and sources for news of all types. See *id.* at 64-65.

The Commission, moreover, has never demonstrated a connection, supported by evidence, between ownership of media outlets and the level of viewpoint diversity in the marketplace. Indeed, in its 2016 ownership order, the FCC identified significant problems impeding the study of the link between diversity of viewpoint and ownership, including the “lack of a reliable measure of viewpoint.”⁷³ Given that the FCC has been unable to even design a reliable study to analyze the connection between ownership and viewpoint diversity, it cannot justify retention of the existing local ownership rules on the basis they affirmatively promote viewpoint diversity in the marketplace.⁷⁴

While the FCC’s concern with viewpoint diversity focuses on the provision of news programming, musicFIRST asserts that the Commission also should consider, for the first time, viewpoint diversity in the context of radio stations’ music programming. musicFIRST contends that “all [song] lyrics are written with viewpoint” and even that “[a]ll singers interpret lyrics from a viewpoint,” and argues that, based on this conception of viewpoint diversity, the FCC should not make any changes to the radio ownership caps.⁷⁵ musicFIRST, however, has shown no sound reason for the Commission to fundamentally alter its long-standing conception of viewpoint diversity in order to retain competitively outdated

⁷³ 2016 Ownership Order, 31 FCC Rcd at 9995 n. 944; see also NAB Comments at 67-68 (discussing the empirical literature concluding that factors other than separate ownership – particularly consumer preferences – primarily drive media “slant”).

⁷⁴ See NAB Comments at 66-68. Arguments connecting the necessity for existing or additional ownership rules to commenters’ dislike for the political leanings of certain media outlets are contrary to First Amendment principles and should not be considered. See NMHC Comments at 18 (contending that “media ownership rules have real consequences on behavior” and citing the “polarizing effects” of conservative media outlets, calling them a “source of widespread conspiracy theories”).

⁷⁵ musicFIRST Comments at 19-22 (emphasis in original).

ownership restrictions.⁷⁶ In light of the almost infinite number of songs from innumerable composers and performers available 24/7/365 to anyone with a smartphone, it seems frankly absurd to claim a lack of diversity (viewpoint or otherwise) in the audio marketplace. musicFIRST's approach – simply ignoring the vast diversity of audio content – is not an option for the FCC here, given the requirements of Section 202(h) and the Administrative Procedure Act (APA).

musicFIRST, moreover, does not attempt to concretely define, or suggest how the FCC could reliably measure, its novel conception of viewpoint diversity for purposes of empirically establishing (rather than presuming) a link to ownership structures. That may be the case because musicFIRST, as a practical matter, is actually focused on representation of female and minority performers and songwriters, and has labeled its concern with artist representation as viewpoint diversity to try to bring that concern within the traditional purview of the FCC's ownership rules.⁷⁷ The Commission should not expand the goals of its rules to include songwriter and performer representation or retain restrictions on station ownership based on claims of underrepresentation in radio air play, which would raise a host of thorny issues, including regulatory overreach in constitutionally sensitive areas.⁷⁸

⁷⁶ As discussed in Section II.A., the Commission has concluded, starting with its 2002 ownership review, that media “other than radio play an important role in the dissemination of local news and public affairs information,” and that the local radio rule is “competition-based.” 2003 Ownership Order, 18 FCC Rcd at 13739; *accord* 2008 Ownership Order, 23 FCC Rcd at 2077.

⁷⁷ “Underrepresentation on terrestrial radio airwaves of performers and songwriters of color and who are female represent a lack of viewpoint diversity that must be studied by the FCC prior to further deregulating radio station ownership at local market levels.” musicFIRST Comments at 22.

⁷⁸ For example, justifying any regulation of broadcasters, including ownership restrictions, based on the airplay given or not given to any particular groups or individuals raises concerns about government intervention into broadcasters' discretion and editorial judgment under the First Amendment. See, e.g., *CBS, Inc. v. DNC*, 412 U.S. 94, 116, 124-25

In addition, the Commission should reject musicFIRST's call to retain the current station caps unchanged while the FCC conducts studies on a potential link between the alleged underrepresentation of women and minorities in radio airplay and common ownership of radio stations.⁷⁹ Even a cursory review of musicFIRST's efforts to connect the FCC's local radio ownership rules with the airplay received by female/minority performers shows the dubiousness of their arguments.

Specifically, musicFIRST focuses on the alleged underrepresentation of female artists on country radio (and of people of color on radio overall) and tries to draw connections to ownership consolidation in radio.⁸⁰ Its efforts fail to do so for many reasons, including but not limited to the following:

- (1) musicFIRST is attempting to reduce the broad societal problem of gender bias to a problem of the ownership of radio stations. The terms of the FCC's ownership rules will not address gender bias in the music industry generally or in the country music industry specifically.⁸¹ It also is hard to understand, for example, how limiting an entity to owning five FM stations in the largest radio markets in the

(1973) (rejecting the view that “potential speaker[s] [are] ‘the best judge’ of what the listening public ought to hear,” affirming that Congress “pointedly refrained from divesting broadcasters of their control over the selection of voices,” and stressing that broadcasters have editorial discretion consistent with their traditional journalistic role). Justifying rules restricting ownership of radio stations based on song airplay may also exceed the FCC's statutory authority. See, e.g., *MPAA v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002) (concluding that the FCC lacked authority under Sections 1, 4(i) and 303(r) of the Communications Act to adopt rules “about program content”).

⁷⁹ See musicFIRST comments at 25-43.

⁸⁰ Given the short time frame for our reply comments, NAB does not attempt here to review the accuracy of the statistics that musicFIRST cites about the airplay received by female performers. That is unnecessary, in any event, given musicFIRST's inability to show that radio station ownership structures result in the underrepresentation asserted or that such an inquiry is properly within the purview of the FCC.

⁸¹ The opening lines of the report attached to musicFIRST's comments state: “Gender has been a central dynamic of the country music culture . . . throughout the genre's history As research has shown, a rigid male/female binary underpins the genre's century-long history.” Jada E. Watson, *Gender Representation on Country Format Radio: A Study of Published Reports from 2000-2018*, at 1 (Apr. 2019) (Watson Gender Report).

U.S., rather than eight as NAB proposes, actually addresses gender bias. Simply put, nothing connects the number of radio stations owned to the presence or absence of gender (or racial/ethnic) bias.

- (2) musicFIRST's own comments and its attached report undercut its claim that ownership consolidation has driven down the frequency of airplay of female performers on country radio stations. While asserting that female airplay in country radio has declined from around the year 2000,⁸² musicFIRST also states multiple times that female representation on country radio has particularly declined over the past three or past five years, which does not coincide with a period of notable further consolidation in the radio industry.⁸³ The radio ownership caps have not been changed for 23 years, and, according to a report by Kagan of radio (and TV) deal volume, 2006 was the most recent year with a high volume of radio transactions.⁸⁴

⁸² The actual beginning point of the asserted decline is unclear. musicFIRST states that female artists "have been increasingly underrepresented on terrestrial country radio following 1998," but the two data sets used in the Watson Gender Report cover the years 2000-2018 and 2002-2018. musicFIRST Comments at 25, 29.

⁸³ See, e.g., musicFIRST Comments at 28 (stating that the number of spins granted to female artists on country radio has continued to decline over the last three years); at 29 (citing a trade publication reporting that the percent of country radio airplay given to women declined from 2016 to 2017); at 30 (quoting Watson Gender Report that the last five years have been "particularly problematic for country culture"); Watson Gender Report at ii (stating that the situation for women in country radio "has worsened over the last three years" and that the "last five years (and in some cases 2018 in particular) emerge as particularly problematic").

⁸⁴ Inside Radio, *Kagan: Broadcast Deal Volume Rose 8% To \$8.9 Billion In 2018* (Jan. 4, 2019). Two major radio mergers have occurred since 2006, Entercom's acquisition of CBS Radio in 2017 and Cumulus Media's acquisition of Citadel Broadcasting in 2011. musicFIRST tries to link these mergers to a material decline in female airplay on country stations, but its effort is less than convincing. The data are limited, including only those country stations part of the mergers that stayed country-formatted stations following the transactions. In the end, rather than focusing on the mixed results for female representation on country stations following the Citadel/Cumulus merger, musicFIRST instead primarily complains that the playlists of the country stations got shorter for both female and male performers and mixed (*i.e.*, female and male) ensembles after the merger. See musicFIRST Comments at 38. And musicFIRST's focus on the small number of country-formatted stations involved in the Entercom/CBS merger seems beside the point. See *id.* at 37. Following its acquisition, Entercom immediately made changes to radio formats across multiple genres nationwide, including switching stations in New York City and Dallas to Alternative, filling a "gaping" hole in those markets. Lance Venta, *A Year In, Has Entercom's Massive Revamps of CBS Radio Stations Paid Off?*, Radiolnsight.com (Nov. 19, 2018). In the first year after the merger, Entercom made 11 format changes at former CBS stations, including moving a Chicago station to Classic Hip-Hop. *Id.* Notably, it also made "Channel Q," its LGBTQ+Talk Radio Network, a top initiative. Since last fall, Entercom has been rolling out

- (3) musicFIRST cites a report from USC Annenberg about the lack of female representation in country music, which found that from 2014-2018, “representation of female artists in *country* music was much less than the representation of female artists in *pop* music,” looking at the country and pop charts.⁸⁵ This finding undermines musicFIRST’s argument about the alleged connection between radio station ownership and underrepresentation of women. No one can claim with a straight face that stations with a country format are consolidated while stations that play pop music are not. Thus, factors other than multiple station ownership must be at play.

- (4) musicFIRST’s general discussion of lack of representation of people of color on radio stations is lackluster at best. It includes block quotes from three articles (two of which are from 2006 and 2012), laments Congress’ elimination of the national radio cap in 1996 and displays a misunderstanding of the factors driving programming diversity on radio.⁸⁶

In short, musicFIRST has not shown a link between common ownership of radio stations and underrepresentation of female/minority artists on-air that justifies retention of the existing local radio rule while the FCC conducts studies. Section 202(h) is quite clear: the FCC every four years must review its broadcast ownership rules, determine whether those rules are necessary in the public interest as the result of competition, and repeal or

Channel Q programming nationwide at a rapid pace; it can now be heard OTA in 14 markets and is available nationwide on radio.com. See *id.*; Inside Radio, *Entercom’s LGBTQ+ ‘Channel Q’ Sees Rapid Growth In 6 Months* (May 23, 2019). Perhaps musicFIRST should be applauding the Entercom/CBS merger for its diversity benefits, rather than condemning it.

⁸⁵ musicFIRST Comments at 33-34 (emphasis in original).

⁸⁶ In discussing the separation of playlists between commonly owned stations in local markets, musicFIRST states: “Some in the radio industry argue that if not for such separation of playlists, co-owned stations in local clusters would compete for the same listeners.” musicFIRST Comments at 42. But if co-owned stations targeted the same listeners, they would air similar programming, which would reduce, not increase, program diversity in local markets. Commonly owned stations try to maximize their audiences by appealing to a wider range of listeners, and as a result, air varied and different, not similar, programming, which increases the diversity of programming available in the market. Multiple radio commenters here have reconfirmed this economic truth, and musicFIRST’s efforts to question it are unavailing. See Section III.A.3., *infra*; NAB Comments at 38-39.

modify any rules that are not. This obligation is “impervious” to discretion.⁸⁷ Because marketplace factors have made the current local radio rule unnecessary, the Commission must modify or eliminate it in a timely manner.

III. THE COMMISSION MUST UPDATE ITS LOCAL RADIO OWNERSHIP RULE TO ACCURATELY REFLECT TODAY’S BROADER MEDIA MARKETPLACE

Opponents of changing the local radio ownership rule make various unsupported claims to buttress their erroneous arguments. Some contend, for example, that modernizing the rules will not help radio broadcasters address their competitive problems,⁸⁸ or that “relaxation of the subcaps will do little to counter the diffusion of radio’s market position.”⁸⁹ Other commenters seem to exist in an alternate media universe, claiming that the only relevant competition is between terrestrial radio stations⁹⁰ or waxing nostalgic about how life was better in the early 1990s when each radio broadcaster had “no more than an AM/FM combo.”⁹¹ To put it bluntly, these arguments are based on an antiquated view of the media marketplace. As one small, independent radio broadcaster correctly observed: “[i]t hasn’t stayed 1996 in the real world. It cannot stay 1996 in radio if radio as we know it expects to survive going forward.”⁹²

⁸⁷ *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016).

⁸⁸ See musicFIRST Comments at 10-11; MMTTC Comments at 5-9; Mount Wilson Comments at 5; Urban One Comments at 1, 13.

⁸⁹ Salem Comments at 2; see also Crawford Comments at 2.

⁹⁰ See musicFIRST Comments at 6; iHeart Comments at 8-12; Free Press Comments at 11-13; Urban One Comments at 4-5.

⁹¹ Letter of Saul Levin, President, Mount Wilson FM Broadcasters, Inc., to Chairman Ajit Pai, FCC, at 4, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (May 10, 2017); see also Mount Wilson Comments at 1 (recommending that the FCC reduce the number of stations one company can locally); King City Comments at 2 (“fondly recall[ing] the days when broadcast radio stations were owned by the people who lived in the communities served by the station, when owning a radio station was not only about profit, but also about making sure the station served the community in the best way possible”).

⁹² Grant Co. Reply Comments at 3.

If commenters opposing reform looked critically at the competitive state of broadcast radio and the larger media marketplace, they would see that the very concerns they purport to care about – the health of the AM service, the viability of local news and informational programming and diversity of station ownership – have not fared well under the FCC’s current rules. Instead, these commenters largely rely on bare assertions and hypothetical threats to maintain their knee-jerk negative reaction against any possibility of regulatory reform. If the FCC gives credence to these parties’ unsupported claims, it will place the future of a healthy, competitive terrestrial radio industry at risk.

Based on actual evidence in the record, the Commission, if it determines to retain broadcast-radio specific ownership caps, should adopt NAB’s proposal, and allow radio broadcasters to achieve greater economies of scale by: (1) eliminating caps on AM ownership in all markets; (2) permitting a single entity to own up to eight commercial FM stations in Nielsen Audio markets 1-75 (with the opportunity to own up to ten FMs by successfully participating in the FCC’s incubator program); and (3) imposing no restrictions on FM ownership in Nielsen markets 76 and lower and in unrated markets. NAB’s proposal reflects the competitive changes in the marketplace since 1996 that impact broadcast radio generally, and it appropriately accounts for the special challenges facing small-market stations and AM stations.

A. Continuing to Define the Relevant Market in a Manner that Ignores the Vast Majority of Outlets and Platforms Competing for Consumer Attention and Advertising Dollars Will Only Harm Broadcast Radio and Its Audiences

Commenters erroneously insisting that the relevant marketplace consists only of AM and FM radio stations provide very little relevant data to support their position.⁹³ Instead,

⁹³ See musicFIRST Comments at 6; iHeart Comments at 8-12; Free Press Comments at 11-13; Urban One Comments at 4-5.

they brush aside contrary facts and rely on outdated, and at times irrelevant and inflammatory, arguments.⁹⁴ Remarkably, many even argue for a narrow market definition while at the same time acknowledging broader competitive forces and their negative impact on local radio stations, thus showing that the relevant market is not solely confined to terrestrial radio stations.

Urban One, for instance, says it does not mean “to suggest that terrestrial radio does not compete with other audio delivery methods like satellite, streaming, and podcasting.”⁹⁵ iHeart asserts that, while “internet-based advertising has had some negative impact on broadcast advertising revenues. . . such competitive pressures across platforms within the audio ecosystem are not determinative of what is the relevant market.”⁹⁶ Salem similarly admits that it is “understood that free, local AM/FM radio, fac[es] competition from a mind-bending variety of competitive audio choices, as well as a coming array of in-dashboard audio sources.”⁹⁷ And musicFIRST again shows its frustration at failing to persuade Congress to alter U.S. copyright law by suggesting the FCC should not expand its market definition because doing so would give broadcasters “an even greater competitive advantage over other audio delivery platforms” than they allegedly have due to Congress’ refusal to impose performance rights fees on local stations.⁹⁸

⁹⁴ NAB is particularly troubled by the noxious and unsupported claim of Free Press that relaxing the FCC’s radio ownership rules will “make[] it easier for broadcasters to spew hate speech without reproach and without alternatives available to listeners who want to switch off stations that purvey such content.” Free Press Comments at 4. Such baseless accusations against the broadcast industry are wholly unwarranted and undermine any shred of credibility one might be inclined to give Free Press.

⁹⁵ Urban One Comments at 5.

⁹⁶ iHeart Comments at 12.

⁹⁷ Salem Comments at 9.

⁹⁸ See musicFIRST Comments at 3-4. NAB has previously refuted this absurd argument. See NAB Reply Comments, MB Docket No. 18-227, at 5-6 (Oct. 9, 2018). These parties’

While these commenters brush aside competitive reality and even incorrectly assert that the Commission should not focus on competitive issues,⁹⁹ iHeart is exactly right that NAB's proposal "seeks to address the competitive challenges facing radio broadcasters from other audio platforms such as satellite broadcasting, digital music services such as Pandora and Spotify, and social media such as Facebook."¹⁰⁰ And we also agree with iHeart's declaration from a previous quadrennial review:

[S]ome commenters invite the FCC to turn a blind eye to reality, suggesting that media markets are not vibrantly competitive or arguing that alternative sources – regardless of their popularity – should not be considered here. This invitation is remarkable in its blatant disregard for the facts, and, more importantly, is one that the Commission is statutorily required to decline.¹⁰¹

unhappiness over congressional decisions on copyright law is no reason for the FCC to disregard its statutory obligation under § 202(h) to "ensure" that its radio ownership rules "keep pace with the competitive changes in the marketplace." *Prometheus I*, 373 F.3d at 391. The FCC also should dismiss the idea that AM/FM radio stations have a significant competitive advantage over other participants in the media marketplace, audio or otherwise. While copyright law treats different media outlets differently, terrestrial radio stations have many other costs and burdens that do not apply to their various marketplace competitors, especially online ones. Every radio broadcaster must acquire an FCC license by paying market price for it either in an auction or via an FCC-approved transaction from an existing licensee; build, acquire and/or lease and then maintain extensive infrastructure including transmitters, towers and antennas; comply with FCC regulations ranging from keeping online public files and station logs to providing EAS alerts to preparing quarterly/issues programs lists; and fulfill its statutory obligation to serve its community of license to qualify for renewal of its license every eight years. Above all, radio stations provide their signals free OTA to the public. Given these substantial costs borne by terrestrial broadcasters but not by internet-based media providers, current differences in copyright law do not result in AM/FM stations having a "massive" (or perhaps any) competitive advantage and are not a valid reason for the FCC to retain ownership caps adopted in the analog era, as musicFIRST contends. *Id.* at 4.

⁹⁹ musicFIRST Comments at 6, 12; see Section II.A., *supra*.

¹⁰⁰ iHeart Comments at 32.

¹⁰¹ Reply Comments of Clear Channel Commc'n, Inc., MB Docket No. 06-121 *et al.*, at 6 (Jan. 16, 2007); see also Clear Channel 2006 Comments at iii-iv ("[I]t is clear that marketplace developments have rendered the current local radio ownership caps entirely unnecessary in light of competition, and that allowing higher levels of common ownership will not cause any competitive harm, but will actually produce net benefits for American consumers."); Clear Channel 2010 Comments at ii ("In this competitive environment, the continued retention of broadcast radio ownership limits in any form plainly cannot be

As discussed above, the Commission must determine here whether the local radio ownership rule remains necessary in the public interest as the result of competition.¹⁰² Across the two core metrics of competition – audience and advertising dollars – radio broadcasters compete in a vastly more expansive marketplace than one only accounting for competition between AM and FM stations. The FCC must finally adopt a market definition that reflects the true state of competition and adjust its radio ownership caps accordingly.

1. Consumers Have a Finite Amount of Time to Consume Media Content, and Broadcasters Compete for a Share of That Time with an Ever-Expanding Number of Content Providers and Platforms

Arguing that the only source of competition relevant to the FCC's inquiry is competition between radio broadcasters misses the forest for the trees. Consumers only have so much time during the day within which they can consume media content. While terrestrial radio stations certainly compete for audiences with each other, the evidence conclusively shows that consumers spend more and more time with an increasing number of content providers on a range of devices. Rather than being the primary source of audio content as in decades past, radio stations today must compete with myriad outlets for a share of that listening time in a highly fragmented market.

NAB's comments detailed the extent of this competition. For example: 60 percent of the U.S. population ages 12+ listens to online audio on a weekly basis; average time spent listening to online audio has increased 169 percent since 2008; consumers streamed more than 900 billion songs in 2018; there were more than 50.2 million paid streaming music subscriptions in the U.S. in 2018 and this number is growing rapidly; in late 2018, pure-play

justified as 'necessary in the public interest.' Evidence submitted in the 2006 quadrennial review, which remains true today, establishes that radio ownership rules are not necessary to address competition concerns.”).

¹⁰² See Section 202(h), 1996 Act; Section II.A., *supra*.

streaming providers (e.g., Spotify, Pandora) accounted for nearly 91 percent of total streaming usage; there are more than 29 million podcast episodes available and podcasting's share of ear has grown substantially; 92 percent of millennials reported owning a smart phone in 2018, compared to the 50 percent of people ages 18-34 who had a radio in their homes; and the average music listener now uses 4.4 devices each week to access music, with millennials using an average of 5.2 devices.¹⁰³ At the same time, listenership to AM/FM radio has declined significantly, particularly among those under age 50.¹⁰⁴

Data provided by Edison Research to commenters in this proceeding further confirms the significance of this competition, particularly for young audiences. In 2019, persons ages 13-24 spent nearly three times as much time streaming audio (125 minutes per day) as they spent listening to over-the-air radio (53 minutes per day).¹⁰⁵ And the data further show that while time spent listening to other platforms is increasing, share of time spent listening to radio is decreasing. From 2014 to 2019, the daily time persons ages 13-24 spent listening to AM/FM OTA radio declined 38 percent, compared with an 11 percent increase in

¹⁰³ See NAB Comments at 8-17 (citing Edison Research and Triton Digital, *The Infinite Dial 2019* (Mar. 2019); Nielsen, *Total Album Equivalent Consumption in the U.S. Increased 23% in 2018* (Jan. 8, 2019); RIAA, *2018 Year-End Music Industry Revenue Report*, at 2 (Feb. 28, 2019); BIA Radio Study at 4-5, 7-9; Ross Winn, *2019 Podcast Stats & Facts*, podcastinginsights.com (Apr. 11, 2019); Jingjing Jiang, *Millennials stand out for their technology use, but older generations also embrace digital life*, Pew Research Center (May 2, 2018); Edison Research and Triton Digital; *The Infinite Dial 2018* (Mar. 2018); Nielsen *Music 360 U.S. Report*, at 22).

¹⁰⁴ See NAB Comments at 17-18; BIA Radio Study at 4-5, Figures 1 & 2 (estimating that over the period 2003-2018, stations' nationwide Average Quarter Hour audiences decreased by 30.3 percent).

¹⁰⁵ Joint Comments of Connoisseur Media, LLC, Townsquare Media, Inc., Mid-West Family Broadcasting, Midwest Communications, Inc., Frandsen Family Stations, Cherry Creek Media, Neuhoff Communications, Eagle Communications, Inc., Patrick Communications, LLC and Legend Communications, LLC, MB Docket No. 18-349, at Exhibit A-6 (Apr. 29, 2019) (Joint Comments).

time spent listening to streamed audio.¹⁰⁶ Even among all Americans ages 13+, which includes older Americans who typically rely more heavily on traditional media, the average amount of daily listening to OTA radio broadcasts fell 27 percent just in the past five years, compared with a 44 percent increase in time spent listening to streamed audio.¹⁰⁷ As Dick Broadcasting summarized this market transformation: in 1996, “there were no smartphones, no Apple Music, no Apple Radio, no playlists, Spotify was not available, and XM and Sirius had not yet launched their satellites. Likewise, Pandora was not in existence, [and] Alexa was the name of a person.”¹⁰⁸

The Commission should summarily dismiss the highly situational opinion of musicFIRST, which contends that the relevant market here – for the supposed sake of listeners – should be limited to AM/FM radio,¹⁰⁹ while proclaiming elsewhere that “digital services are where we now turn for music.”¹¹⁰ In fact, last year musicFIRST 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.”¹¹¹

¹⁰⁶ Joint Comments at Exhibit A-9, A-12.

¹⁰⁷ *Id.* at A-1, A-8, A-11.

¹⁰⁸ Dick Broadcasting Letter at 2; see also Comments of Curtis Media Group, Inc., MB Docket No. 18-349, at 2 (Apr. 29, 2019) (noting that it “experiences this new competitive landscape firsthand every day at each of its North Carolina radio stations”).

¹⁰⁹ See musicFIRST Comments at 6.

¹¹⁰ 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).

¹¹¹ musicFIRST Press Release at 1-3, attaching results of January 2018 survey by Morning Consult.

Given musicFIRST's own words and the findings of its own survey, as well as the extensive record in this proceeding, the Commission must reject musicFIRST's inconsistent (to put it mildly) position here and define the relevant market as including, at the least, terrestrial radio broadcasters, satellite radio providers and providers of audio programming over the internet and to mobile devices. Retention of a market definition based on the premise that only AM/FM radio stations are relevant competitors for audiences would be contrary to Section 202(h) and arbitrary and capricious.

2. Broadcast Radio Competes Against Myriad Outlets for Advertising Dollars, Stations' Sole Source of Income

Turning to competition in the advertising market, opponents of reform once again offer blanket assertions dismissing concerns about competition for vital ad dollars without data to support their positions. Many even ignore the issue of competition for advertising entirely.¹¹² Others illogically assert that the need (or the inability) to compete against internet companies, including Facebook and Google, is no justification for ownership reform or that streaming, satellite radio, podcasts, Facebook and YouTube complement rather than compete with what local stations offer to advertisers.¹¹³ One party against ownership rule relief even objects to large radio clusters offering "very low [advertising] rates," which, unfortunately for that commenter, actually supports expeditious approval, not rejection, of NAB's proposal.¹¹⁴

¹¹² See Section II.A., *supra*.

¹¹³ NABOB Comments at 12; Urban One Comments at 5; see also MMTC Comments at 6-7 (stating that "broadcasters have correctly recognized that these [digital] platforms are competing with radio for advertising dollars," but opposing ownership rule reform).

¹¹⁴ Mount Wilson Comments at 2.

These arguments all fail. None of them refutes extensive evidence in NAB's comments demonstrating the shift in ad dollars away from traditional media, including broadcast radio, to myriad digital platforms and the resulting financial challenges facing stations, especially given the slower overall growth in the advertising market since the Great Recession.¹¹⁵ Additional data from Borrell Associates reconfirms these points with remarkable clarity. Borrell unequivocally states that "local advertisers see radio and digital advertising as substitutes – shifting dollars back and forth between these media for various reasons."¹¹⁶ Remarkably, while 91 percent of local ad-buyers surveyed by Borrell said they used Facebook, only 44.4 percent of local ad buyers reported using radio. As Borrell explained, Facebook in particular "mimics the attributes of radio, giving advertisers access to affinity groups that were once chiefly the domain of radio's music genres (country music fans, sports talk fans, hip hop fans, oldies' fans, etc.)."¹¹⁷ Alarming, Borrell predicts that the migration of advertising dollars from broadcast to digital "has only just begun."¹¹⁸

The experience of small and mid-sized broadcasters provide additional insight into how these competitive dynamics impact local markets across the country. To highlight just a few of the many examples: in Tri Cities, Washington, there are an estimated 26 radio advertising account executives compared with 80 from other media companies, including at

¹¹⁵ See NAB Comments at 20-28; BIA Radio Study at 10-13 (reporting that radio's share of the local ad market fell from 10.7 percent in 2012 to an estimated 8.7 percent in 2019 to a projected 7.7 percent in 2023, and that radio stations' OTA ad revenues fell by a nominal 25 percent from the mid-2000s to 2018, even without accounting for inflation).

¹¹⁶ Joint Comments at Exhibit B-4.

¹¹⁷ *Id.*

¹¹⁸ Joint Comments at Exhibit B-5.

least 60 account executives from digital companies;¹¹⁹ advertisers in Springfield, Illinois reportedly get 40 to 50 phone calls from digital companies on a regular basis, where they used to get just a handful;¹²⁰ and the same goes for advertisers around the country, including from Maine, to New York, Minnesota and Montana.¹²¹

Unsurprisingly, radio broadcasters are losing vital ad dollars to digital outlets. As they have attested: Sandhill Media's 2019 year-to-date advertising revenue figures suggest it will earn approximately \$200,000 less from local advertising compared to 2018;¹²² Midwest Communications' Lansing, Michigan stations have lost nearly \$500,000, or 25 percent, of their annual revenue, and in Green Bay, the Midwest stations have lost more than \$350,000 in the last year from just eight advertisers who moved to digital advertising;¹²³ Neuhoff Communications' Lafayette, Indiana stations lost nearly 75 percent, or \$248,000, of the ad spend from one automotive dealer group that shifted to digital;¹²⁴ and Townsquare Media's Albany, New York stations lost \$266,500 across just three advertisers to digital competitors.¹²⁵ As one Wyoming broadcaster summarized, stations in their markets are seeing advertising dollars shift from "radio to digital dollars in varying magnitudes across

¹¹⁹ Joint Comments, at Declaration of Jonathan Brewster, Cherry Creek Media, at 1 (Cherry Creek Declaration).

¹²⁰ Joint Comments, at Declaration of Beth Neuhoff, Chief Executive Officer and President, Neuhoff Communications, at 3 (Neuhoff Declaration).

¹²¹ Joint Comments, at Declaration of Erik Hellum, Chief Operating Officer – Local Media, Townsquare Media, Inc., at 1-3 (Townsquare Declaration).

¹²² See Joint Comments, at Declaration of M. Kent Frandsen, President, Frandsen Media Company, at 1 (Frandsen Declaration).

¹²³ See Joint Comments, at Declaration of Michael Wright, Chief Operating Officer, Midwest Communications, Inc., at 2, 5 (Midwest Communications Declaration).

¹²⁴ Neuhoff Declaration at 2.

¹²⁵ Townsquare Declaration at 3.

virtually every advertiser category we have—doctors, hospitals, dentists, lawn care, plumbers, hospitality operators, construction—and many more.”¹²⁶ Grant, a small Midwest broadcast company, echoed that sentiment: “the issue is less and less about our stations versus other competing stations. Instead, our experience tells us that there is significant advertising migration away from traditional media, such as radio, toward new media.”¹²⁷

A few commenters parrot back opinions cited in the Notice that relaxing the local radio ownership rule will not help broadcasters compete for advertising dollars against digital platforms.¹²⁸ These contentions are unsupported by evidence and mischaracterize the arguments supporting reform. Broadcasters are not trying to become the equivalent of Google or Facebook; nor are they suggesting that allowing radio owners to acquire more stations will cause advertisers to cease their use of digital ad platforms. Radio broadcasters, however, have demonstrated that competition has adversely impacted their stations’ advertising revenues, and that many broadcasters must achieve greater economies of scale to operate more efficiently and spread their fixed costs across more outlets. Further, a group

¹²⁶ Joint Comments, at Declaration of Susan K. Patrick, Managing Partner, Legend Communications of WY, LLC, at 2.

¹²⁷ Grant Co. Reply Comments at 1; see also Comments of Galaxy Communications LLC, MB Docket No. 18-349, at 3 (Apr. 29, 2019) (Galaxy Comments) (stating that the share of ad dollars garnered by its radio stations and other terrestrial stations in the Syracuse and Utica, NY markets “declined significantly in recent years while the share of advertising garnered by digital media is increasing rapidly”).

¹²⁸ See Notice at ¶ 19 (quoting Eric Rhoads, *Radio’s Weak Argument to the FCC Reveals a Deeper Problem*, Radio Ink (Aug. 2, 2018) and Letter from Jessica Marventano, Senior Vice President, Government Affairs, iHeartMedia Inc., to Michelle Carey, Chief, Media Bureau, FCC, at 3-4 (filed Oct. 9, 2018)); see also NABOB Comments at 11 (quoting the same); musicFIRST Comments at 11 (quoting Rhoads blog; Glenn Cherry and Ronald Gordon, *The Three Types of Radio Deregulation*, Radio World (July 25, 2018)).

owner with additional stations in a local market will be able to reach more and different listeners, thus enhancing its stations' attractiveness to potential advertisers.¹²⁹

The real issue here boils down to the fact that digital outlets command an increasingly large percentage of total advertising revenue in each local market – revenue that used to be earned by owners of broadcast stations and other traditional media. As Borrell explained, “[d]ata-driven digital media has quietly been able to become ‘local’ by collecting geolocation and other personal data about their user base and visitors,” resulting in the diversion to digital outlets of locally spent ad dollars, which are “the lifeblood of local print and broadcast media.”¹³⁰

Free Press, an ardent opponent to any regulatory relief, actually expresses why this competition for advertising revenue matters. Free Press is right that audiences in small markets “are no less deserving of competitive, local and diverse broadcast media that serves the public interest” and that this type of content is “resource-intensive.”¹³¹ Free Press is living in a fantasy land, however, if it thinks that small broadcasters around the country will be able to continue producing this important, high-quality content as finite advertising dollars are spread across an ever-increasing number of outlets.

¹²⁹ See, e.g., Borrell Associates, *Local Media's New Phase: Survival of the Fittest* (Mar. 11, 2019). According to Borrell's 2018 local advertising survey, 90 percent of local advertisers use both digital and traditional ad platforms, compared with five percent that use only traditional advertising and four percent that use only digital advertising. Advertisers are also using a greater number of types of media than in the past, increasing from 5.5 types of media to eight types of media in just three years. *Id.*

¹³⁰ Joint Comments at Exhibit B-11; see also *id.* at B-10 (finding that in the Boston advertising market in 2018, the total advertising share for more than 125 non-digital local media outlets was less than the share digital media garnered, and radio specifically earned only 6.9 percent of total local advertising dollars).

¹³¹ Free Press Comments at 5, 7, 12.

To restate the obvious, radio stations in all markets depend almost entirely on advertising revenue, and only stations in the top 25 makes earn on average at least \$2 million in annual revenue.¹³² Many broadcasters, especially in mid-sized, small and unrated markets, are barely able to generate revenues sufficient to cover their stations' fixed costs, and thus struggle to invest in improving those stations' programming and technical facilities or hiring additional staff.¹³³ The lower ad revenues earned by stations in these markets is a direct consequence of the smaller populations and economic bases in those markets.¹³⁴ 25-7 Media, a radio broadcaster in one of these small markets, explains that advertising dollars in its community are being split between two broadcasters at a time when “[t]here is virtually no ‘new money’ for businesses to sink into advertising and new businesses are few and far between Businesses struggle and now both media companies are struggling as well.”¹³⁵ If, however, the two operations could combine, 25-7 Media believes that “would create significant efficiencies that would save money” and allow local radio to “thrive” in their community, but the FCC’s current rules prohibit this beneficial – indeed, necessary – combination.¹³⁶

¹³² See NAB Comments at 30; BIA Radio Study at 14 (showing the low levels of revenues earned by stations in market 76-265).

¹³³ NAB Comments at 32-33.

¹³⁴ NAB Comments at 31; BIA Radio Study at 14.

¹³⁵ Letter from Aaron J. Leiker, President and General Manager, 25-7 Media, to the FCC (Apr. 30, 2019).

¹³⁶ *Id.* (urging FCC to “help struggling small media companies” by “remov[ing] ownership restrictions on small, unrated markets”); see also Galaxy Comments at 6 (relaxing the ownership limits will allow small broadcasters like Galaxy “to take advantage of critical economies of scale that operation of multiple stations permit”); Comments of West Virginia Radio Corporation, MB Docket No. 18-349, at 5 (Apr. 15, 2019) (“enabling broadcasters in smaller markets to take advantage of economies of scale would ensure the viability of local broadcasting in the face of ever-increasing competition from new media sources”); Letter of Vanguard Media, MB Docket No. 18-349, at 1-2 (Apr. 29, 2019) (noting the “explosion of entertainment and information delivery mechanisms” and urging the FCC to loosen its rules

Broadcasters like 25-7 Media are not attempting to beat Google and Facebook, but they are trying to provide quality local service to their communities. As Dick Broadcasting Company noted, it is expensive to “attract and pay strong local on-air talent, to provide local news and information, to offer health insurance and to deliver other benefits to our employees,” but to remain a viable competitor in the market, stations must invest in this “qualified talent, strong programming, and local news, sports and informational programming.”¹³⁷ And while certain parties are loathe to admit it, quality local service can only be offered by economically viable radio stations.¹³⁸

Maintaining strict ownership rules on the basis that the only relevant competition is between terrestrial radio stations turns a willfully blind eye to the reality faced by

so that radio broadcasting in general, Vanguard’s smaller operations in New Mexico and its listener base can all benefit) (Vanguard Comments).

¹³⁷ Dick Broadcasting Letter at 1; see also Comments of Reno Media Group, MB Docket No. 18-349, at 2 (Apr. 29, 2019) (Reno Media, a station group with four FM and two AM stations in Reno, Nevada, stated it would like to add to its cluster to “further expand the service it provides to the public,” but it owns the maximum number of FM stations currently allowed and can only add one more AM station).

¹³⁸ The FCC should ignore the crocodile tears that parties like musicFIRST shed over small radio clusters’ supposed inability to compete against larger radio groups, while opposing any relaxation of the radio caps. See musicFIRST Comments at ii, 6, 43. As the record makes clear, many small radio groups are more concerned about competition from digital ad platforms and support reform of the radio caps. In any event, contrary to musicFIRST’s claims, competition is not lacking within the radio industry. According to BIA Media Access Pro (as of May 20, 2019), there were 4,708 separate owners of full power commercial and noncommercial AM/FM radio stations in the U.S., and 7,249 separate owners of all radio outlets (counting full power, translators and LPFM). The sheer number of radio stations also has greatly increased since 1996, thereby increasing competition for listeners and ad dollars. From November 1996 to March 2019, the number of full power AM/FM stations grew nearly 28 percent, from 12,134 to 15,514. The total number of radio stations increased by over 48 percent, from 19,788 to 29,380. See FCC News Releases, *Broadcast Stations Totals as of March 31, 2019* (Apr. 2, 2019) and *Broadcast Station Totals as of November 30, 1996* (Dec. 6, 1996). Unlike the recorded music industry, which is dominated by three major record labels, ownership in the radio industry is dispersed across thousands of stations.

broadcasters in markets around the country, as they lose audiences and ad revenue to non-broadcast competitors. The Commission should adopt NAB's proposal to provide critical relief to local radio stations, especially those in small markets. The BIA Radio Study demonstrates that reform of the local radio caps, as NAB urges, would directly address the economic challenges facing local stations.

BIA's study found that increased economies of scale from relaxing the current caps would improve the financial wherewithal of radio broadcasters struggling in the new media marketplace.¹³⁹ Its analysis of hypothetical transactions, which are not currently allowed but would be permitted under NAB's proposal, found that the station groups in these transactions all benefitted from improved cash flow and that radio stations in small markets, where stations most struggle to cover their fixed costs, saw the greatest percentage increases in cash flow.¹⁴⁰ BIA also explained that these results were not surprising, as such combinations would permit broadcasters to spread their significant fixed costs across more stations with greater combined revenues.¹⁴¹ Permitting additional station combinations thus would help ameliorate many local stations' financial challenges by significantly increasing

¹³⁹ BIA examined actual examples of radio station groups currently constrained by the FCC's caps in four different markets and analyzed the financial impact of their acquisition of an actual smaller station group in their same markets. BIA did not assume any increase in revenue by the stations following their combination; instead, BIA estimated the combinations' financial benefit by analyzing the increased efficiencies and decreased expenses due to economies of scale, and modeled the financial position of the stations before and after their combination to determine the effect on cash flows. Radio Study at i-ii.

¹⁴⁰ See BIA Radio Study at 26-31 (finding improvements in cash flow ranging from 6.0 percent in the largest market to 16.8 percent in the smallest market). It is likely that BIA's analysis understated the benefits to cash flow, given that its analysis did not assume any station revenue increases after the combinations. But because larger station groups appear better able to turn populations reached into revenues, it seems likely that following their combination into a larger group, the stations would earn additional revenues, as well as benefit from increased efficiencies and decreased expenses. *Id.* at 31 and Appendix A.

¹⁴¹ BIA Radio Study at 30-31.

their cash flow and would enable them to become stronger competitors in the future by investing in their programming and facilities.

3. Retaining the Existing Ownership Rules Will Not Effectively Promote Diverse Radio Programming, While Ownership Relief Will Promote Program Diversity and Enhance Broadcasters' Ability to Serve Their Audiences

One commenter opines that changing the current ownership rules would make it more difficult for radio broadcasters to launch new programming to give audiences “real choices.”¹⁴² But the retention of analog-era radio ownership caps will not promote the offering of new programming formats, including ones that appeal to niche tastes and interests. In fact, the exact opposite is true.

As NAB previously explained, economists and the courts have long recognized that common ownership of broadcast stations promotes, not retards, the offering of diverse program formats.¹⁴³ NAB also has previously identified nine empirical studies conducted between 1999 and 2007 agreeing that increased common ownership in the radio industry starting in the 1990s resulted in greater programming diversity.¹⁴⁴

An independent study from 1999 found that both ownership concentration and programming variety available in local radio markets had “increased substantially,”

¹⁴² Urban One Comments at 9 (urging the FCC to foster program diversity to give listeners more options).

¹⁴³ See, e.g., NAB Comments at 38-39, 68 & n. 262 (citing, *inter alia*, Peter Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q. J. Econ. 194 (1952)). If, for example, a broadcaster owned all the channels in a market, its optimal strategy would be to air in each time slot a varied menu of programs to appeal to every group of potential viewers or listeners in the market, “not just the largest group[,] [f]or that would be the strategy that maximized the size” of the broadcaster’s audience. *Schurz Commc’n, Inc. v. FCC*, 982 F.2d 1043, 1054 (7th Cir. 1992).

¹⁴⁴ See Comments of NAB, MB Docket Nos. 06-121, *et al.*, at 19-22 (Oct. 22, 2007); Comments of NAB, MB Docket No. 09-182, at 87-88 (July 12, 2010).

consequently “suggest[ing] that the increased concentration has been good for listeners.”¹⁴⁵

A 2007 study of the radio industry commissioned by the FCC evaluated the effects of ownership structure on programming, advertising prices and listenership, and its results were “consistent with the previous literature that finds more concentrated markets are associated with more, not less, program variety.”¹⁴⁶ This study also found that (1) “consolidation of radio ownership does not diminish the diversity of local format offerings”; (2) “[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”; (3) “consolidation in local radio has no statistically significant effect on average listening”; (4) audiences “served by large radio groups, as measured by the number of commercial stations owned nationally by in-market owners, listen more”; and (5) “consolidation in local radio has no statistically significant effect on advertising prices.”¹⁴⁷

¹⁴⁵ Steven Berry and Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting*, Nat’l Bur. Econ. Research, Working Paper 7080, at 25-26 (Apr. 1999) (also finding that “increased concentration caused an increase in available programming variety”). *Accord* Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q. J. Econ. 1009 (Aug. 2001); see also BIA Financial Network, *Over-the-Air Radio Service to Diverse Audiences*, at 5, 7, Attachment G, NAB Comments, MB Docket Nos. 06-121, et al. (Oct. 23, 2006); Statement of Prof. J.A. Hausman, at 2-4, 10, Exh. 2, Comments of Clear Channel Commc’n, MB Docket Nos. 06-121, et al. (Oct. 23, 2006); Bear Stearns Equity Research, *Format Diversity: More from Less?* (Nov. 2002); BIA Financial Network, *Has Format Diversity Continued to Increase?*, Attachment A, NAB Comments, MM Docket Nos. 01-317, 00-244 (Mar. 27, 2002); Statement of Prof. J.A. Hausman, at 2-3, 11-14, Exh. 3, Comments of Clear Channel Commc’n, MM Docket Nos. 01-317, 00-244 (Mar. 27, 2002); Comments of NAB, MM Docket No. 99-25, Attachment B, *Format Availability After Consolidation* (Aug. 2, 1999) (all concluding that radio program diversity increased after 1996).

¹⁴⁶ FCC, 2007 Ownership Study No. 5, Tasneem Chipty, CRA International, Inc., *Station Ownership and Programming in Radio*, at 45 (June 24, 2007).

¹⁴⁷ *Id.* at 40-45. A GAO report further found that within individual markets, the top radio formats differ from the top radio formats nationally, indicating that programming decisions are locally made based on the preferences and interests of local listeners. Gov’t Accountability Office, GAO-10-369, *Media Programming: Factors Influencing the Availability*

Based on this substantial evidence, the Commission should expect that, if it loosens the existing radio caps, consumers would benefit from increased program diversity in their local markets. In fact, comments and declarations submitted by ten small and mid-sized radio groups document the many ways that liberalizing the local radio rule would afford station owners “more resources to serve the public interest.”¹⁴⁸ As these groups make clear, they are not interested in cutting costs, slashing jobs or turning on syndicated programming, as the opponents of reform suggest.¹⁴⁹ Rather, each expresses a real desire to increase service to their communities if only the FCC’s rules would enable them to do so.

Several broadcasters with stations in smaller markets, where the ownership caps are more strict, make clear that if given the chance to own more stations, they would add additional programming formats to serve smaller subsets of their markets.¹⁵⁰ In addition to

of Independent Programming in Television and Programming Decisions in Radio, at 28 (Mar. 2010).

¹⁴⁸ Joint Comments at 23.

¹⁴⁹ See Free Press Comments at 9-10; Urban One Comments at 3; musicFIRST Comments at 14-18; Comments of Steven L. White, MB Docket No. 18-349, at 3 (Apr. 29, 2019).

¹⁵⁰ See, e.g., Joint Comments at Declaration of Thomas A. Walker, President, Mid-West Management, Inc., at 2 (noting that in South Bend/Elkhart, Indiana, there is only one regional Mexican music format to serve the 16 percent of the population that is Hispanic, there is no Alternative music radio format even though 50 percent of the market is of the target age group, and there are no commercial Jazz or Blues stations despite the large percentage of Black and African American populations in the communities, saying “[t]hese demographics all represent opportunities for growth in the South Bend and Elkhart communities. Currently, they are not being served, as the stations in the market concentrate on the mass formats with the largest listening audience, resulting in competing stations fighting over the same mass market audience”); Frandsen Declaration at 2 (“Today, the limitations on ownership have forced us to focus on formats with wider potential audiences to optimize the stations we have. We would love to do more to highlight the community and serve more people, and having a bigger local platform would give us more resources to do so.”); Cherry Creek Declaration at 2 (“[i]n the current environment, station owners seek to provide programming that will appeal to the broadest audience. As a result, programming in most markets is focused on a small number of popular formats, often with two or more stations offering substantially similar programming. If owners were permitted to own more stations in local markets, it would likely result in new format offerings because it would no

offering their communities new programming formats, these radio owners also want to add more local news, sports and emergency coverage¹⁵¹ and contribute more to community events and causes.¹⁵²

This extensive record evidence shows the public benefits to be gained from relaxing the radio caps and demonstrates the error of those parties opposing any ownership rule reform based on unexamined assumptions that common ownership of stations automatically harms audiences more dependent on OTA broadcasting.¹⁵³ And while multiple

longer make sense to have multiple stations within the same ownership group with the same format.”).

¹⁵¹ See, e.g., Joint Comments at Declaration of Jeffrey D. Warshaw, Founder and Chief Executive Officer, Connoisseur Media, LLC at 2 (With ownership deregulation, “in the event of a natural disaster or tragedy like Hurricane Sandy or 9/11, we would have the ability to broadcast lifesaving information to a greater number of people. Greater presence would also allow us to address local problems like gang violence with a stronger voice We would be able to have larger news departments, better traffic reporting, and additional information departments.”); Midwest Communications Declaration at 3 (“Ownership deregulation in Fargo-Moorhead would allow for the acquisition of some of the smaller operators that do not currently produce their own news, and otherwise rebroadcast weather content and programming. Our stations would be able to utilize their full-time local news team, local meteorologist, and live sports coverage to distribute live and local content that members of the community want and care about. This would allow us to maintain a large, live staff based in North Dakota and Minnesota. Over the years, we have covered Red River flooding, train derailments, fires, and other emergencies. Being able to continue to do so on a broader basis would save crops during floods, homes during tornadoes, businesses during derailments, and most importantly, lives.”); Neuhoff Declaration at 1 (“The economics of covering the news in a declining revenue space are prohibitive. Where once we had thriving healthy newspapers and full television newsrooms, we find ourselves, in some cases, the only real time source of local news.”).

¹⁵² See, e.g., Frandsen Declaration at 2 (“From a community service perspective, we would be able to participate in and promote more events each year. We are currently involved in several large events, including Coins for Kids, which provides clothes and toys for kids during the holiday season. At this time, we are able to dedicate only one station towards that fundraiser because we need the other stations to maximize sales in order to cover the expense and airtime of promoting the program.”); Joint Comments, at Declaration of Gary Shorman, Chairman and Chief Executive Officer, Eagle Communications, at 1 (“By having greater scale and additional resources, we can provide better content, more diverse formats, and become more involved with local businesses and events”).

¹⁵³ See, e.g., NHMC Comments at 9-11; Leadership Conference Comments at 7-8.

station groups will increase program diversity if given the opportunity, NAB also disputes suggestions that AM/FM radio stations today do not offer a wide range of programming to serve diverse audiences.¹⁵⁴

B. NAB's Proposal Takes Account of the Needs of Both AM and FM Radio

Several opponents of NAB's proposal argue that the Commission cannot change or remove the radio subcaps because that will seriously damage the value of AM stations.¹⁵⁵ As an initial matter, this argument fails because it relies on the outdated market definition that the Commission must reject – that is, a market limited only to terrestrial broadcast radio stations. Only in a market artificially limited to AM/FM radio stations does the relative strength of AM versus FM, and the potential harm to AM versus the potential benefit to FM, become a primary, let alone the deciding factor.¹⁵⁶ In a properly defined market encompassing the full range of competing content providers and advertising platforms, the

¹⁵⁴ See, e.g., musicFIRST Comments at 40-41. According to BIA, the number of Latino-programmed full-power AM/FM stations in the U.S. has increased by about 80 percent since 2000, reaching 994 stations today; the number of Asian-programmed stations has grown from 21 in 2006 to 96 today; 373 full-power stations provide a range of programming targeted to different demographic groups within the African American community. See BIA Media Access Pro data, as of May 14, 2019; BIA, *Over-the-Air Radio Service to Diverse Audiences*, at 9-10, Att. G to NAB Comments, MB Docket Nos. 06-121, et al. (Oct. 23, 2006). In addition, according to Xperi, as of April 2019, there were 2,242 HD Radio stations on air in the U.S., broadcasting an additional 2,124 channels, for a total of 4,366 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).

¹⁵⁵ See MMTTC Comments at 11-12; Salem Comments at 2-10; iHeart Comments at 29-33; NABOB Comments at 2, 5-12; Crawford Comments at 1-2; Urban One Comments at 10-11.

¹⁵⁶ See, e.g., Comments of Alpha Media LLC, MB Docket No. 18-349, at 2 (Apr. 29, 2019) (Alpha Media Comments) (stating that in today's "highly competitive marketplace, audio service is simply audio service" and that the AM/FM subcaps "have long been unsustainable and should not be maintained as an aspect of the local radio ownership rule"); Vanguard Comments at 1 (stating that broadcast radio today should simply be thought of as another form of audio content).

focus appropriately becomes the ability of the radio station industry as a whole to compete successfully and serve audiences effectively.

These opponents' arguments also reflect a second fundamental problem: they are, implicitly or explicitly, asking the Commission to subsidize their specific business model and their choice to acquire multiple AM stations. As Salem stated, if the subcaps were removed, "[t]he final result could be an asset devaluation of companies with sizeable AM radio station ownership."¹⁵⁷ Whether or not this assumption is correct, it would be inappropriate for the FCC to maintain the current, competitively unnecessary ownership subcaps to effectively coerce broadcasters into acquiring or retaining one type of radio outlet over another so as to support the business models of certain private entities. That is not the meaning of the public interest under the Communications Act, and it would not fulfill the FCC's obligations under Section 202(h).

In any event, the parties against modernization once again fail to provide actual evidence to support their claims that adoption of NAB's proposal will be the virtual death knell of AM radio. Indeed, in a notable concession, iHeart acknowledges that "there is no clear evidence of a causal relationship between the existing local radio ownership rules and the growing competitive imbalance between AM and FM radio stations in the broadcast radio market. . . ." ¹⁵⁸ The Commission cannot refrain from updating its ownership rules based on unproven, speculative claims.

¹⁵⁷ Salem Comments at 6; see also iHeart Comments at 29 (noting the risk of "plummeting valuation of AM stations").

¹⁵⁸ iHeart Comments at 18.

1. NAB Proposal's Would Remove All Caps on AM Ownership and Would Not Force, or Even Encourage, Any Broadcasters to Sell Their AM Stations

NABOB and other commenters fear that any relaxation of the subcaps would give companies “permission to abandon AM radio as part of their market maximization strategies,”¹⁵⁹ but no aspect of NAB’s proposal would require, or even directly encourage, radio broadcasters to sell their AM stations. As documented in NAB’s comments, AM broadcasters face particular challenges in the current diversified media and advertising marketplaces; thus, it is vital that the FCC encourage as much investment in the AM band as possible.¹⁶⁰ That is why NAB’s proposal would eliminate all restrictions on AM ownership.

Unlike under the existing rules, radio broadcasters under NAB’s proposal would not be required to count AM stations toward their overall local market cap. Thus, an owner in the top 75 markets that reaches NAB’s proposed eight station cap on FM ownership may find it attractive to add AMs, and station groups in all markets will have more flexibility to develop viable business models unencumbered by unnecessary and anticompetitive caps on AM ownership. Contrary to the fears of some parties, NAB’s proposal would not force broadcasters to sell their AM stations to invest more in the FM band.

2. It Is Inappropriate and Anti-Consumer for the FCC to Risk the Long-Term Competitive Viability of the Radio Industry by Retaining Strict Limits on Radio Broadcasters, Whether AM or FM

iHeart asserts that “[o]ne potential scenario,” should the Commission raise or eliminate the FM subcap, would be to lessen demand for AM stations and to cause AM stations to go off the air.¹⁶¹ While couching the potential harm in qualifying language, iHeart

¹⁵⁹ NABOB Comments at 10; see *also* MMTC Comments at 11; Crawford Comments at 2; iHeart Comments at 29.

¹⁶⁰ See NAB Comments at 34-35; BIA Radio Study at 15-18.

¹⁶¹ See iHeart Comments at 30.

sounds the alarm that the Commission must not jeopardize the availability of local news and emergency information in communities, and thus argues that the FCC must “exercise extreme caution” to avoid harming AM stations.¹⁶²

While NAB has long championed the service provided by AM stations, it is just not the case that provision of emergency information to the public would significantly suffer if demand for some AM stations declined. Thousands of FM and TV stations across the country provide EAS alerts and emergency journalism, and no commenter has shown any reason to believe that adopting NAB’s proposals would cause AM radio to disappear. As Alpha Media noted, “recent advances in technology, including online streaming, HD radio, and the use of FM translators to augment AM station broadcast signals, have improved the ability of AM radio to compete in the marketplace. In addition, many of the top stations in large and small markets are AM radio stations.”¹⁶³ iHeart also has made no effort to establish that the large numbers of news formatted AM stations it cites actually provide predominantly local news.¹⁶⁴

Thus, iHeart’s warning of serious consumer harm from repeal of the subcaps is speculative at best. What’s more, iHeart’s arguments run counter to its own past advocacy,

¹⁶² iHeart Comments at 24.

¹⁶³ Alpha Media Comments at 2. iHeart itself previously urged the FCC to eliminate the subcaps because “[i]f any colorable justification ever existed for the subcaps, it has been totally eviscerated not only by the evidence of AM radio’s strong performance as a competitor and revenue generator, but by technical advances that have provided AM stations a host of means to compensate for any technical inferiority to FM stations.” Clear Channel 2010 Comments at iii.

¹⁶⁴ See iHeart Comments at 25. While iHeart cites hundreds of news-formatted AM radio stations, other estimates have found only about 30 commercial local all-news stations in the U.S., and some of them, like WTOP here in Washington, operate on the FM band. See *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking, 29 FCC Rcd 4371, 4436 (2014).

when it argued that, if the FCC eliminated all subcaps, “divested properties will in many cases be AM stations, which, as noted above, often serve concentrations of minority populations in certain cities. They can therefore be expected to provide opportunities for station purchases by minorities, women and small businesses.”¹⁶⁵

Ironically, Salem, another opponent of relaxing the subcaps, illustrates how providing greater flexibility for broadcasters to operate on the FM band can enhance service to local audiences. Salem highlights five markets where AM operations shifted to the FM band and enjoyed considerable success with audiences. For example, in San Francisco, when KCBS-AM switched to the FM band, KCBS’s ratings increased and it became a more competitive provider of news in the market; in Dallas, KTCK-AM added an FM signal, and within just a few years, the FM service was accounting for nearly 90 percent of the station’s average quarter-hour listening among persons 12+; and in Atlanta, WSB began simulcasting on the FM band, and the FM service now accounts for 80 percent of the station’s total listening audience.¹⁶⁶

Contrary to Salem’s belief that listeners would suffer if content shifts between the AM and FM bands,¹⁶⁷ these examples in fact show the consumer benefit to providing increased flexibility for more broadcasters to program on the FM band, if they choose to do so. The FCC should not maintain FM subcaps to effectively force radio broadcasters to continue operating AM stations even if the broadcasters believe that offering content on FM stations

¹⁶⁵ Clear Channel 2010 Comments at 45; see *also* Clear Channel 2006 Comments at 73 (“Elimination of the AM/FM subcaps . . . is likely to foster increased radio ownership by small businesses and minorities.”).

¹⁶⁶ See Salem Comments at 5.

¹⁶⁷ See Salem Comments at 10.

would better serve their audiences. Maintaining a rule premised on discounting consumer preference is bad for consumers and bad for broadcasters.

The FCC's quadrennial review is ultimately about assessing the broadcast industry's ability to compete in today's digital marketplace, which means modernizing outdated rules in a way that enhances the ability of both AM and FM stations to compete successfully. As the data and testimonies of broadcasters make clear, all radio stations – including FM – need to achieve greater economies of scale. That is why NAB's proposal provides maximum relief to AM radio and meaningful relief to FM radio. The Commission should not reject much-needed FM ownership relief, especially in smaller markets, out of fear that it might reduce demand for AM stations. That would be the regulatory equivalent of cutting off radio's nose to spite its face.

3. The FCC Should Foster AM Broadcasting in Ways Other than Artificially Depressing the Potential of FM Stations

NAB agrees with commenters who are fearful for the future of the AM radio service that technical and competitive challenges have led to diminished audience shares and advertising revenues. That is why NAB's proposal would provide complete relief from restrictions on ownership of AM stations. But retaining artificial ownership limits on FM station ownership is not the most efficient or direct mechanism to foster the success of the AM service.

Beyond exempting AM broadcasters from ownership limits, the Commission should also consider supporting certain technical proposals that will help improve AM radio sound quality and help AM broadcasters better compete in the increasingly crowded audio marketplace. For example, the Commission should promptly advance a pending petition for rulemaking filed by Bryan Broadcasting, which urges the FCC to initiate a rulemaking to

allow AM radio stations to voluntarily broadcast in the MA3 all-digital mode of HD radio.¹⁶⁸ Testing and real-world experience have demonstrated that all-digital operations will allow broadcasters to provide pristine sound, free of the interference that plagues analog AM service. All-digital service also will allow broadcasters to transmit metadata along with the audio content that provides program title, artist information, album artwork and other information that audiences accustomed to digital audio sources now expect. With this option, AM broadcasters will be far more equipped to compete against FM stations, as well as digital audio services.

The FCC should also consider ways to reduce the interference noise floor that degrades analog AM service. The proliferation of wireless systems and cheap electronic devices, as well as fluorescent and LED lights, flat screen TVs, computer monitors and smart phone chargers, have all hindered AM service, driving away audiences. Although the FCC has pursued proposals that would allow stations to overcome ambient noise, it has not yet meaningfully considered ways to address the root of the problem. The FCC should conduct a thorough review of the Part 15 and Part 18 rules, mechanisms for better screening devices that will cause interference, and consider more vigorous enforcement of these rules.¹⁶⁹ Such measures would more directly address the sound quality issues at the root of consumers' shift from AM toward FM than would retaining competitive unnecessary – indeed harmful – restrictions on ownership of radio outlets.

¹⁶⁸ Petition for Rulemaking to Further AM Revitalization, Bryan Broadcasting Corporation, RM-11836, MB Docket No. 13-249 (Mar. 25, 2019).

¹⁶⁹ See Reply Comments of the National Association of Broadcasters, MB Docket No. 13-249, at 7-8 (Apr. 16, 2016).

IV. THE RECORD DEMONSTRATES THAT THE CURRENT LOCAL TV RULE IS NO LONGER JUSTIFIED

As demonstrated by NAB and other commenters, digital disruption of the media marketplace has resulted in audience fragmentation and advertising dollars shifting from local TV stations to online and MVPD platforms. Accordingly, the current local TV ownership rule can no longer be justified under Section 202(h) or the Administrative Procedure Act. In light of the record here, NAB again urges the Commission to eliminate its *per se* top-four restriction and its blanket ban preventing common ownership of more than two local TV stations in the same market, thereby allowing stations to realize economies of scale, improve their competitive position and make necessary investments in their operations, local programming and physical plant. The FCC should disregard the self-serving, factually inaccurate and legally unsupported arguments of pay TV providers. Rather than ensuring that the viewing public is served by strong local TV stations, pay TV providers' proposals are designed to weaken their competitors for viewers and advertising dollars and gain an even greater advantage in retransmission consent negotiations.

A. The Record Shows that the FCC Must Update its Market Definition Due to Fierce Competition between Local TV Stations and Myriad Multichannel and Digital Outlets for Audiences and Advertisers

Commenters addressing the issue of market definition overwhelmingly agree that local TV stations compete in a market including outlets beyond other TV stations, and they support modernization of the overly restrictive market definition used by the FCC in the past.

Audience Fragmentation. As NAB showed in its initial comments, local TV broadcasters compete for audiences against an array of other outlets, accessible via a

range of devices, in an increasingly fragmented marketplace.¹⁷⁰ NAB provided extensive evidence of this fragmentation, including:

- Broadcast television's share of prime time viewing (counting cable, broadcast and DBS) among the audience most coveted by advertisers fell from 46 percent in 2003 to just 31 percent in 2018.¹⁷¹ These figures overstate TV stations' share of all video viewing, because they do not take account of streaming or subscription video on demand; if SVOD and streaming were included in total viewing, then broadcast's share would be smaller still.
- The ratings of the most popular broadcast TV programs declined by over 67 percent from the 1985-1986 TV season to the 2017-2018 season.¹⁷²
- The rising amount and popularity of OTT video platforms such as Amazon Prime Video (100 million subscribers), Netflix (60.55 million subscribers) and Hulu (25 million subscribers) has fueled their ability to invest in original scripted series. In 2018, the number of original scripted series reached 495, and OTT providers and cable programmers both offered more original series than broadcasters.¹⁷³
- Viewers increasingly substitute OTT options for traditional TV viewing (broadcast and cable/satellite), which dropped 9.6 percent overall from 2014 to 2018, with larger declines among adults ages 35-49 and precipitous declines among those under age 35.¹⁷⁴ This decline in traditional TV viewing has been accompanied by a rise in viewing via computers (up 63.4 percent from 2014-2017), smartphones (up more than six-fold from 2014 to 2018), tablets and other devices.¹⁷⁵

¹⁷⁰ NAB Comments at 44-49.

¹⁷¹ NAB Comments at 46 (citing Nielsen, U.S. Live + Same Day 2003, 2018). Broadcast TV's share of total day viewing among those ages 18-49 was only 26 percent in 2018, down from 40 percent in 2003. *Id.* Among all persons ages two and older, broadcast TV's share of prime time viewing fell from 44 percent in 2003 to 34 percent in 2018, and its share of total day viewing among those ages 2+ declined from 39 percent in 2003 to 31 percent in 2018. Nielsen, U.S. Live + Same Day 2003, 2018.

¹⁷² NAB Comments at 47 and Attachment E.

¹⁷³ NAB Comments at 45-46 and Attachments C & D.

¹⁷⁴ NAB Comments at 47-48; BIA TV Study at 6. Ride TV's dubious attempt to characterize the growth of online video distribution as a "boon" to TV broadcasters includes no ratings data whatsoever and should be disregarded. See Ride TV Comments at 4.

¹⁷⁵ NAB Comments at 48-49; BIA TV Study at 7-9. In their feeble attempts to argue that relaxation of the ownership rules is not needed due to the high demand for and viewing of broadcast content, certain commenters cite limited data about the still substantial amount of viewing of "traditional" TV – counting broadcast and cable/satellite *combined* – which do not prove their claims about viewership of broadcast TV specifically or the necessity of broadcast-only ownership restrictions. See, e.g., Comments of Writer's Guild of America,

Several commenters agree with NAB about the plethora of competitors for audiences' time and attention. Due to the hundreds of pay TV channels and extensive online programming, including original productions, Nexstar declares that broadcasters today are "in a war for viewer attention with well-funded media giants, Internet companies and telecom companies"¹⁷⁶ NPG also discusses the "vast proliferation of alternatives" available via MVPD and OTT services, and observes that digital and pay TV companies are afforded a clear competitive advantage over traditional broadcasters: the ability to leverage economies of scale and scope.¹⁷⁷ And in addition to competing for viewers, Meredith observes that "digital behemoths" are competing with broadcasters for programming and talent and that broadcasters are hamstrung by FCC restrictions in their ability to compete for top quality content.¹⁷⁸

West, Inc., MB Docket No. 18-349, at 3 (Apr. 29, 2019) (also ignoring the significant declines in the viewing of traditional TV overall and broadcast network programming specifically). The FCC should disregard the Writers Guild's almost comical attempt to argue that online sources are not substitutes for broadcast TV in providing "must-have sports programming." *Id.* at 5-6; see also NCTA Comments at 1 (top-four stations are "unique" because they offer "marquee programming, such as sporting events"). These commenters ignore the obvious migration of very significant sports programming to cable, including college football and basketball (including championship and NCAA tournament games) and NBA, NHL and MLB regular season and playoff games. The fact that so many viewers watched one event – the Superbowl – on broadcast TV rather than via streaming merely illustrates that it takes unusually popular live events for broadcast TV to earn the mass audiences that stations once routinely attracted. See Writer's Guild Comments at 6.

¹⁷⁶ Nexstar Comments at 3, 9 (discussing a partnership between Verizon and YouTube and noting that Netflix invested \$12 billion in original content in 2018 and is projected to spend \$15 billion and \$17.8 billion in 2019 and 2020, respectively).

¹⁷⁷ Letter of David R. Bradley, Chief Executive Officer, News-Press & Gazette Company, MB Docket No. 18-349, at 2-3 (Apr. 26, 2019) (NPG Comments) ("Large capital investments in equipment and facilities generally are required to create enriching and engaging media content, and OVDs and MVPDs are often able to better recoup those large, fixed investments by taking their content and disseminating it across multiple platforms . . .").

¹⁷⁸ Letter of Joshua N. Pila, General Counsel, Local Media Group, Meredith Corporation, MB Docket No. 18-349, at 3 (Apr. 29, 2019) (Meredith Comments) ("Internet companies are

Advertising Competition. As NAB explained initially, TV stations' share of local advertising revenue is shrinking due to a plethora of competing outlets, many of which have competitive advantages over broadcast stations because they can target and track consumers. From 2000-2018, local TV stations' advertising revenue plummeted by 40 percent, after accounting for inflation,¹⁷⁹ and their share of local ad revenue fell from 14.2 percent in 2012 to 11.5 percent in 2019 and is projected to decline to 10.8 percent by 2023.¹⁸⁰ These advertising dollars have been redirected to competing platforms, such as MVPD interconnects and pure-play online and mobile advertising,¹⁸¹ which have risen to dominance in a short time.¹⁸²

Additional evidence provided by broadcast commenters bolsters NAB's showings of fierce competition in the advertising marketplace. Nexstar explains that "[a]dvertisers do not have separate 'buckets' of advertising dollars" for different media outlets. Rather, they have "one bucket of dollars that they use to reach the target audiences they desire to reach at the best prices."¹⁸³ The record shows that these dollars are increasingly being directed to platforms that offer advertisers a greater ability to target audiences according to location,

bidding for the employees, specifically showrunners, producers, and on-screen talent that traditionally would have only been on network television. Further, Amazon is bidding on sports rights just like television stations, and digital behemoths (FAANG) are competing for the same programming and the same viewers as local broadcasters.").

¹⁷⁹ NAB Comments at 53 (citing BIA TV Study at 15-16 and Figure 10).

¹⁸⁰ *Id.* at 50 (citing BIA TV Study at 10-12 and Figures 6-7).

¹⁸¹ *Id.* at 50-57.

¹⁸² *Id.* at 50-51 (citing BIA TV Study at 12-14 and Figure 8) (showing that pure-play digital's share of the total local ad market increased from a mere 8.1 percent in 2010 to 31.5 percent in 2019 and a projected 38.2 percent in 2023). Other analysts estimate that the digital ad sector has a much higher share of the U.S. ad market. See, e.g., Sara Fischer, *Digital ads expected to crush everything else this year*, Axios (Feb. 20, 2019) (citing projection from eMarketer).

¹⁸³ Nexstar Comments at 6.

demographics, spending habits and other factors, as well as the ability to track a viewer's actions in response to an ad.¹⁸⁴ As Nexstar observes, MVPD interconnects offer advertisers the ability to reach broad or narrow audiences depending on their interests, and local advertising is now “showing up as pre-roll” on numerous digital platforms.¹⁸⁵ Another TV broadcaster documented the following shifts in advertising spending from its customers (or former customers) across a variety of industries in different local markets:

- a large law firm shifted approximately \$500,000 away from TV advertising toward its own YouTube channel
- a local sandwich franchise moved almost half of its local advertising spend to digital
- a car dealer now spends 90 percent of its local advertising money on digital, including search, targeting, geofencing and automobile aggregator sites
- a paint company's *entire* quarterly local advertising budget was shifted to digital
- a local hospital moved *all* of its local ad spend to digital platforms
- a telco's *entire* marketing budget is being moved to digital.¹⁸⁶

As NAB discussed in its comments, competition from other advertising platforms disproportionately impacts smaller market TV stations.¹⁸⁷ One commenter with stations in markets with very small populations observes that the marked shift to digital is “felt harder in smaller markets,” where “[a]ny significant loss in revenue . . . has an outsized effect on that station's ability to pay the largely fixed costs required to create and disseminate

¹⁸⁴ See NAB Comments at 24-25, 52-53.

¹⁸⁵ Nexstar Comments at 7-8; see also NPG Comments at 3 (stating that MVPDs compete not only in programming, but also in local advertising) (citing *Communications Marketplace Report*, GN Docket Nos. 18-231, *et al.*, FCC 18-181, at ¶¶ 92, 96, 98 (Dec. 26, 2018)).

¹⁸⁶ Meredith Comments at 2. Meredith also cites a recent Borrell Associates report finding that in 2018 “digital had a 53% share of the \$126.3 billion total U.S. local ad market.” *Id.* at 1 (citing Wayne Friedman, *U.S. Local Digital Advertising Forecast to Rise in 2019*, MediaPost (Apr. 3, 2019)).

¹⁸⁷ NAB Comments at 70-71 and Attachment G.

content.”¹⁸⁸ Another commenter describes stark differences in the economics of large market and small market TV operations, observing that average amount spent annually on news by Big Four network affiliates in top ten DMAs (\$15.7 million) is greater than the total amount of advertising revenue earned by every TV station in the Albany, GA DMA (rank #152).¹⁸⁹ As a result, stations in small markets cannot afford to invest in local programming to the same extent as large market stations, and they must “share resources across multiple stations” to make local programming affordable.¹⁹⁰

Given these competitive realities, commenters strongly urge the FCC to jettison its outdated view that TV broadcasters compete only against themselves and modify its local TV ownership rule to reflect today’s media and advertising marketplaces.¹⁹¹ As the record makes clear, modernizing the local TV rule to reflect actual competition for audiences and advertising is critical to local stations’ viability as competitors and their ability to deliver the news, information and entertainment their local audiences expect.¹⁹²

¹⁸⁸ NPG Comments at 5 (stating that NPG’s stations are located in markets with no more than 340,000 viewers, which represents a tiny fraction of the population of the nation’s largest DMAs).

¹⁸⁹ Comments of Gray Television, MB Docket No. 18-349, at 11-12 (Apr. 29, 2019) (Gray Comments).

¹⁹⁰ Gray Comments at 12.

¹⁹¹ See Nexstar Comments at 5-6; see also NPG Comments at 2 (stating that the FCC should “define the relevant marketplace to include recent and emerging sources of non-broadcast competition”); Meredith Comments at 2 (stating that the FCC need not wait for DOJ to update its view of competition to broadcasting and should “lead with recognition of the current media marketplace”); Gray Comments at 9-10.

¹⁹² See, e.g., Meredith Comments at 4 (“Broadcasters are committed to localism, and especially local news and weather. Weakening broadcasters in competing for dollars in the local advertising marketplace simply weakens the players most committed to localism.”); NPG Comments at 5 (stating it is “critical for stations in smaller markets to be able to leverage economies of scale and scope” in order to “fund meaningful local broadcasting services, including the provision of news [and] emergency information”); Gray Comments at

Only one commenter directly addressing the issue of market definition for purposes of the local TV rule contends that the relevant market should continue to be limited to local broadcast stations. The FCC could – and should – disregard Free Press’ comments because they entirely fail to address competition for either audiences or advertising revenue, and thus, Free Press has no sound basis for even stating an opinion about market definition.

Moreover, to support its claim that broadening the market is inappropriate, Free Press largely relies on outdated data and cites sources that do not even support its claims. For example, to buttress its argument that digital outlets lack the resources to engage in local newsgathering and reporting, Free Press cites an article about a study published in 2010, which was based on review of news coverage in a single city in 2009.¹⁹³ It would be arbitrary and capricious to rely on limited, decade-old data in reaching any conclusions about the competitive landscape facing local TV stations in every market in the country in 2019, particularly given that more recent data show the percentage of Americans who prefer to obtain local news online (37 percent) is nearly the same as the percentage who prefer to obtain it from local TV stations (41 percent).¹⁹⁴ Similarly, Free Press continues to assert that the digital divide presents a barrier to accessing local news online, relying on its own research from 2016 (which is based on information published and/or gathered in 2015).¹⁹⁵ But, as discussed in Section II.B., more recent data show that these gaps have

3 (stating that if the top-four ban is eliminated, local news “will not only survive in [s]mall [m]arkets,” but “will expand and can thrive”).

¹⁹³ Free Press Comments at 12 (citing Ben Fritz, *Most original news reporting comes from traditional sources, study finds*, Los Angeles Times (Jan. 11, 2010), citing Pew Research Center, *How News Happens: A Study of the News Ecosystem of One American City* (Jan. 11, 2010)).

¹⁹⁴ Pew Research Center, *For Local News, Americans Embrace Digital but Still Want Strong Community Connection*, at 3 (Mar. 26, 2019) (Pew 2019 Local News Report).

¹⁹⁵ Free Press Comments at 12 (citing Derek S. Turner, Free Press, *Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption*, at 4 (Dec. 2016)).

narrowed and are likely to continue narrowing, and that retaining competitively outdated ownership restrictions does not address the digital divide directly or effectively.

Other sources relied upon by Free Press do not support the point it is trying to make. Asserting that online news outlets are the least popular sources for *local* news, Free Press quotes a Knight Foundation report as stating that “[t]raditional broadcasters are responsible for a significant portion of the news video published on social media, especially on Facebook.”¹⁹⁶ As the very next sentence of that report makes clear, however, that conclusion does not concern content provided by local TV stations at all. Instead, it states that in June 2017, “five of the Top 10 news video publishers on [Facebook] were traditional TV networks including, ABC, BBC, CNN and Fox News . . .” which are clearly not U.S. local broadcast stations.¹⁹⁷ Free Press also asserts that, while more people may be getting news online, many use “digital tools to access traditional broadcast television and radio newscasts.”¹⁹⁸ But the cited source actually states the opposite. It explains that 76 percent of those Americans who obtain news from local TV stations watch it on their TV sets, rather than on the stations’ websites or social media accounts, which means that those viewers who do rely on local TV news are typically *not* accessing it online.¹⁹⁹

¹⁹⁶ Free Press at 7 (citing Knight Foundation, *Local TV News and the New Media Landscape: Part 3: The Future of Local News Video*, at 3 (Apr. 5, 2018)); see also Ride TV Comments at 4 (erroneously quoting the same language as “evidence that broadcasters produce a significant portion of the video news content published on internet and social media platforms”).

¹⁹⁷ Knight Foundation, *Local TV News and the New Media Landscape: Part 3: The Future of Local News Video*, at 3 (Apr. 5, 2018).

¹⁹⁸ Free Press Comments at 7 (citing Pew 2019 Local News Report).

¹⁹⁹ Pew 2019 Local News Report at 4 (stating that the “vast majority of Americans who get news from local TV stations primarily do so the old-fashioned way: from the television set (76%), not from the stations’ websites or social media accounts (22%)”).

In short, the record reflects that the digital disruption of the media marketplace has fundamentally altered competition for audiences and advertisers, that TV broadcasters compete with innumerable online and multichannel outlets, and that the current rule impedes local stations' ability to compete successfully and thus their ability to serve viewers most effectively. No commenter has shown any basis for the FCC to retain its analog-era view that local TV stations exist in a market hermetically sealed against the vast array of choices available to consumers and advertisers.²⁰⁰

B. The Commission Should Disregard the Pay TV Industry's Self-Serving Calls to Further Restrict Local TV Ownership

Pay TV providers and certain programmers support retention of the top-four restriction (together with various measures to make it more stringent), claiming that common ownership of more than one top-four station will give broadcasters harmful leverage in retransmission consent negotiations.²⁰¹ Pay TV commenters' claims about broadcasters' supposed leverage in retransmission consent negotiations disregard actual marketplace conditions. Moreover, these parties want to make the current local TV rule

²⁰⁰ While not explicitly directly addressing the issue of market definition, NHMC asserts that online outlets are "not an accurate substitute" for free OTA TV. NHMC Comments at 9. Like Free Press, NHMC fails to provide any analysis of the markets for audiences and advertisers and thus has no real basis for reaching any conclusions about the substitutability of various video services and platforms. As discussed in Section II.B., merely asserting that communities of color and those with lower incomes rely on free OTA broadcasting does not support the conclusion that the existing local ownership rules should be retained. NHMC also misstates the findings of the Pew 2019 Local News Report. Contrary to NHMC's statement (see Comments at 10), the Pew Report did not find that "76 percent" of those Americans who rely on local news consume news through free OTA TV broadcasting. Rather, the Report stated that 76 percent of those Americans who obtain news from local TV stations watch it on TV sets, rather than on stations' websites or social media accounts. And watching local TV stations' news via a TV set can mean that these viewers watch news via an MVPD service, rather than just over-the-air. NHMC also ignores the fact that the number of Americans, especially those under age 50, who often get news from local TV stations has substantially declined in just the past few years. See NAB Comments at 64, n. 248.

²⁰¹ See ATVA Comments; NCTA Comments; Ride TV Comments.

more restrictive, even though the record demonstrates that the existing rule cannot be justified under Section 202(h) and should be relaxed. The FCC should reject these self-serving calls from pay TV commenters.

The pay TV industry remains highly 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 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 subscribers due to cord cutting, 70 percent of all TV households still subscribed to a traditional MVPD service at the end of 2018.²⁰² Measured by subscribers, the ten largest providers control a whopping 94.5 percent of the nationwide pay TV market and 91.5 percent of the nationwide broadband market; the top four providers control 79.4 percent of the pay TV market and 71.0 percent of the broadband market; and the top three control 68.4 percent of the pay TV market and 64.4 percent of the broadband market.²⁰³ And as NAB discussed in its initial comments, the market capitalizations of many pay TV providers dwarf that of even large TV broadcast groups.²⁰⁴ In light of these facts, claims that MVPDs will struggle to negotiate retransmission consent with a TV broadcaster owning two top-four stations in a market ring hollow.

In addition to ignoring MVPDs' own competitive position and leverage, pay TV commenters blatantly ignore the competitive landscape facing broadcasters, which directly

²⁰² Kagan, a media research group within S&P Global Market Intelligence (Q4 2018).

²⁰³ Kagan, a media research group within S&P Global Market Intelligence (Q4 2018). An additional 6.0 percent of TV households subscribe to a virtual MVPD service, such as Sling TV and DirecTV Now, which are owned by the same large, consolidated traditional MVPD and/or broadband providers. *Id.*

²⁰⁴ NAB Comments at 26.

impacts their position in retransmission negotiations. Indeed, ATVA even manages to avoid mentioning the word “competition” when offering its interpretation of the standard applicable under Section 202(h).²⁰⁵ NAB, in contrast, has extensively documented the splintering of audiences and exponential growth in the amount, variety and quality of video programming.²⁰⁶ 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.²⁰⁷ And while ATVA states that the APA requires the Commission to engage in reasoned decision-making and to consider all relevant factors, evidently the intense competition facing local TV stations for audiences and ad dollars is not “relevant” to consideration of the local TV rule and top-four restriction.²⁰⁸

In short, pay TV commenters offer no evidence to controvert the extensive record evidence of rising competition to broadcast stations and increasing consolidation among MVPDs/broadband providers.²⁰⁹ Instead, they repeat the mantra that the top-four ban is

²⁰⁵ ATVA Comments at 5.

²⁰⁶ See, e.g., NAB Comments at 44-49.

²⁰⁷ 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)).

²⁰⁸ See ATVA Comments at 5-6.

²⁰⁹ Ride TV contends that elasticity of demand for MVPD service is “higher than ever,” but the “evidence” it cites is a four-year-old merger simulation, which merely states that “figures suggest” that demand for cable service has become more elastic and which the FCC explicitly cabined, stating that the results “should be viewed as only contributing to an understanding of the competitive impact of the proposed transaction.” Ride TV Comments at 8; *Applications of AT&T and DirecTV*, Appendix C, Analysis of Merger Simulation Models, 30 FCC Rcd 9131, 9345-46 ¶¶ 122, 127 (2015).

necessary to keep them from having to pay higher retransmission consent fees, which they complain are already too high.²¹⁰ Pay TV providers' desire to pay less is not evidence that broadcasters owning more than one top-four station will have the ability to extract supra-competitive prices. Rather, broadcast stations' signals appear to be 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).²¹¹ And in 2018, the year-over-year growth rate in TV stations' retransmission revenues dropped to roughly half what it had been in 2017 (down from 17.4 percent to 8.5 percent).²¹²

²¹⁰ See, e.g., NCTA Comments at 5; ATVA Comments at i; Ride TV Comments at 6-8. Ride TV contends that independent programmers will "bear the brunt of the more limited programming budgets that remain after higher payments for retransmission consent." Ride TV Comments at 8. Like other pay TV industry commenters, however, Ride TV fails to demonstrate that local TV combinations involving top-four stations result in higher retransmission consent fees, and it certainly provides no evidence of a causal connection between fees paid to broadcasters and those paid to independent programmers.

²¹¹ *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. Accord Declaration of Gautam Gowrisankaran, Exh. E to Applicants' Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 at ¶¶ 18-21 (Aug. 22, 2017) (showing that broadcast TV earns less in programming fees than other video programmers, especially if measured on a per-viewer basis).

²¹² Justin Nielson, *Retrans projections update: continued growth through virtual sub gains*, Kagan, a media research group within S&P Global Market Intelligence (June 25, 2018); Justin Nielson, *Retrans projections update: \$12.8B by 2023*, Kagan, a media research group within S&P Global Market Intelligence (June 14, 2017); see also *Communications Marketplace Report*, GN Docket Nos. 18-231, et al., FCC 18-181, at ¶ 75, n. 191 (Dec. 26, 2018) ("growth in retransmission consent fees has slowed").

Pay TV commenters state that they have “evidence” that top-four duopolies lead to higher consumer prices, but the sources cited do not actually provide such evidence.²¹³ First, commenters cite the FCC’s 2014 decision prohibiting joint negotiations among *separately owned* top-four ranked stations, which relied in part upon cable operator filings discussing retransmission consent fees paid to separately owned stations affiliated with Big Four networks.²¹⁴ These limited data are insufficient to support a Commission decision that top-four combinations will materially impact retransmission consent fees. The data are nine years old, came from only three MVPDs, were not limited to commonly owned stations, were never independently verified, and were not focused on top-four ranked stations but on Big Four network affiliates (which are not always ranked among the top four).²¹⁵ Significantly,

²¹³ ATVA Comments at 8-11.

²¹⁴ ATVA Comments at 9-10 (citing *Amendment of the Commission’s Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, 3391 ¶ 16 n. 66. (2014) (2014 Retrans Order)). Ride TV cites this same data as evidence that top-four duopolies led to fee increases of certain percentages “above prior levels.” Ride TV Comments at 7-8. The cited data never purported to compare what stations received in retransmission consent compensation before they were part of a same-market local TV combination (or joint negotiation) versus afterward. Rather, MVPDs stated they were comparing rates paid to stations jointly negotiating retransmission consent vs. rates for stations negotiating individually. See Footnote 215, *infra*.

²¹⁵ These data also were wildly inaccurate when submitted to the FCC in 2010. Only after NAB pointed out serious errors in the data (see, e.g., NAB Supplemental Comments, MB Docket No. 10-71, at 2-4 (May 29, 2013)) did the cable operators make a belated effort to correct their misleading FCC submissions. See Letter from Scott Ulsaker, Pioneer Long Distance Pioneer Telephone Cooperative to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (June 4, 2010); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (Feb. 20, 2014) (correcting erroneous data from a 2010 *ex parte* notice); Letter from Christopher A. Dyrek, Cable America Missouri LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (May 28, 2010) (erroneously including must carry stations in comparison); Letter from Stuart Gilbertson, USA Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (Feb. 24, 2014) (correcting erroneous data from a 2010 *ex parte* notice); Letter from Stuart Gilbertson, USA Communications, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (May 28, 2010) (erroneously including must carry stations in comparison). Each of three (identically worded) cable operator letters supported ACA Connects comments filed

countless pay TV providers (and their associations or alliances) have long complained about alleged harms from retransmission consent negotiations involving more than one Big Four affiliate (or top-four ranked station). Many years and many pleadings later, however, the industry still relies on only three aging examples of higher rates (rates that may have resulted from a range of factors unrelated to top-four rank). If combinations and/or joint operations involving top-four stations and/or Big Four affiliates actually resulted in higher retransmission consent fees, it seems likely that the pay TV industry would have made more than three claims of higher rates over such a long period of time.

The next piece of “evidence” cited is the Department of Justice’s challenge to two proposed broadcast mergers on grounds that the mergers would likely lead to an increase in retransmission consent fees.²¹⁶ But since DOJ opposed each merger and the broadcasters divested the stations at issue, this also is not “evidence” that top-four ownership combinations result in higher retransmission consent prices. Similarly, generalized analyst predictions of a “potential for an improved retrans trajectory” fall far short of proof that a top-four combination gives broadcasters the power to unilaterally raise retransmission consent prices.²¹⁷ ATVA further asserts – but fails to demonstrate – that a proposed transaction involving Apollo, Northwest Broadcasting and Cox shows that local TV combinations can charge higher retransmission consent prices.²¹⁸ While ATVA claims that,

a few weeks before the letters were filed. *Id.* At that time, ACA reported that it had more than 900 members. Comments of the American Cable Association, MB Docket No. 10-71, at 4 (May 18, 2010). If combinations/joint operations among top-four stations actually resulted in higher retransmission consent fees, it seems surprising that more ACA members did not submit evidence to support ACA.

²¹⁶ ATVA Comments at 10-11; see *also* Ride TV Comments at 6-7; NCTA Comments at 4-5.

²¹⁷ ATVA Comments at 11.

²¹⁸ *Id.* at 12-13.

because Northwest Broadcasting controls multiple top-four stations in certain markets, it can “charge among the highest retransmission consent rates in the country,” none of the sources cited by ATVA present any evidence of a causal connection between Northwest’s local TV combinations and the prices, terms or conditions of its retransmission consent agreements.²¹⁹ Indeed, one cited “source” is an article observing that Northwest Broadcasting’s CEO is “well known as a hard-nosed retrans negotiator.”²²⁰ Tenacity does not equate to anticompetitive market power.

In addition to retaining the top-four ban, the pay TV industry proposes that the Commission expand the ban to cover multicast streams and LPTV stations.²²¹ This proposal is inconsistent with Congressional actions to promote the provision of a full complement of network affiliates to TV viewers in all markets, including small ones.²²² It also disregards prior FCC decisions emphasizing the value of multicasting and the potential harms of bringing multicast streams within the scope of the local TV rule. The FCC previously determined that the ability to multicast is not equivalent to owning a second full power

²¹⁹ *Id.* at 12-13.

²²⁰ *Id.* at 13 (citing Harry A. Jessell, *Musings About Apollo-Cox-Northwest-Nexstar*, TVNewsCheck (Feb. 25, 2019)).

²²¹ NCTA Comments at 8-12; ATVA Comments at 14-21.

²²² 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).

station in a market, and that treating multicast stations as full power stations for purposes of the local TV rule could prevent broadcasters from achieving efficiencies that yield public interest benefits.²²³ Nothing has changed to disturb this conclusion.²²⁴ In fact, marketplace conditions today support the FCC's earlier conclusion even more strongly, as the program offerings of broadcast TV stations face increasingly intense competition.

Similarly, 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,²²⁵ 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."²²⁶ In declining to restrict multicast affiliations, the Commission cited its view that there is "no benefit in either encouraging an independent station to carry network programming it does not want or in

²²³ See 2016 Ownership Order, 31 FCC Rcd at 9892 ("[B]roadcasting on a multicast stream does not typically produce the cost savings and additional revenue streams that can be achieved by owning a second in-market station. Therefore, tightening the numerical limits might prevent those broadcasters in markets where common ownership is permitted under the existing rule from achieving the efficiencies and related public interest benefits associated with common ownership. Accordingly, our view, based on the most recent record, is that it is not appropriate to adjust the numerical limits as a result of stations' multicasting capability.").

²²⁴ See NAB Comments at 79-81 and Attachment H (discussing the legal, technical and financial limitations of multicast streams).

²²⁵ 2016 Ownership Order, 31 FCC Rcd at 9892 (citing *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4399-00, FCC 16-107 (2014) (2014 FNPRM)).

²²⁶ 2014 FNPRM, 31 FCC Rcd at 4400 n.170.

depriving a market of a local affiliate of a Big Four network.”²²⁷ Moreover, the FCC explicitly stated that “[a] significant benefit of the multicast capability 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.”²²⁸

The FCC’s earlier conclusions are equally valid today. As NAB explained in its initial comments, 88 markets lack a full complement of full power stations affiliated with the four major broadcast networks. In 80 of these markets, multicast affiliations fill the gap for at least one missing network affiliate, and the vast majority of these markets are small or very small.²²⁹ The multicast affiliation provides viewers with additional options for network programming and, in some cases, additional local news and public affairs programming.²³⁰

²²⁷ 2016 Ownership Order, 31 FCC Rcd at 9892 (citing 2014 FNPRM, 31 FCC Rcd at 4400 n.170).

²²⁸ 2016 Ownership Order, 31 FCC Rcd at 9892.

²²⁹ NAB Comments at 79-80 and Attachment I.

²³⁰ See, e.g., Gray Comments at 13-17. 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. Dual affiliations have allowed Gray to:

- 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-Rhinelanders 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)
- provide similar benefits in other additional markets.

To support its proposal to treat multicast and LPTV stations as full power stations under the ownership rules, ATVA and NCTA provide lists of markets where a broadcaster owns a combination of full power, multicast or LPTV stations affiliated with more than one “Big Four” broadcast network for the apparent purpose of demonstrating that such affiliations should be restricted.²³¹ In many of the listed markets, however, there are too few full power commercial stations to support full power affiliations with Big Four networks, with over half of the markets lacking four full power commercial stations.²³² Restricting multicast or LPTV affiliations in any market would curtail available programming options for local viewers, and the effects would be particularly severe in markets with so few stations.

The Commission has repeatedly and correctly determined that equating multicast streaming to station ownership and restricting dual affiliation on multicast streams would not serve the public interest. For all the reasons it has done so before, the FCC should again

²³¹ ATVA Comments at Exhibit A; NCTA Comments at Table A. We note that NCTA and ATVA do not present any data to demonstrate that any full power, multicast or LPTV station listed is *ranked* within the top four in any local market. The top four rule does not address affiliation but a station’s rank according to its ratings. While Big Four network affiliates are often ranked among the top four, this cannot be assumed across all markets and all stations/multicast streams. In some markets without full power Big Four affiliates, signals from neighboring markets have achieved “significantly viewed” status or are otherwise available to local viewers, impeding the multicast or LPTV affiliate’s ability to attract audiences that might be expected for a full power network affiliate. See, e.g., NPG Comments at 5-6. Additionally, in some markets, stations affiliated with Univision, Telemundo or another network may be ranked among the top four.

²³² Relying on the same data source used by ATVA and NCTA to develop its lists, NAB found that in 46 of the 84 markets identified by NCTA (55 percent) there are fewer than four full power commercial TV stations. In fact, nine of the markets have only one full power commercial station. Similarly, in 49 of the 86 markets listed by ATVA (57 percent), there are fewer than four full power commercial stations, with 10 of these markets having only a single full power station. See Attachment A. Inexplicably, ATVA’s chart identifying whether there are fewer than four TV stations in a market fails to distinguish between commercial and noncommercial stations. Since noncommercial stations cannot operate as affiliates of Big Four networks, the presence of noncommercial stations in a market has no bearing on whether that market can support additional full power network affiliations.

decline to treat multicast streams as full power stations under its local TV rule. Because the same rationales apply to LPTV affiliates of Big Four networks, it also should decline to make the local TV ownership rule more stringent by bringing LPTVs within the scope of the rule.²³³ The pay TV interests have shown no sound basis for the FCC to reverse course here.

NCTA additionally proposes to make the FCC's top-four waiver standard more stringent in two other ways: (i) by effectively limiting the grant of top-four waivers to cases where a station not usually among the top four in its market happens to fall within the top four at the time of an application because of a single popular program,²³⁴ and (ii) by adding a retransmission consent fee criterion to the FCC's waiver analysis, which the FCC rejected in 2017.²³⁵ Although the record supports elimination of the *per se* top-four ban, if the Commission retains the existing blanket ban or adopts another restriction subject to waiver, it should not make its waiver standard more restrictive as suggested by NCTA.

²³³ NAB Comments at 80 (discussing legal, technical and financial limitations of LPTV stations, including their lack of mandatory carriage rights, their secondary status and their limited coverage areas and restricted power); Comments of HC2 Broadcasting Holdings Inc., MB Docket No. 18-349, at 2-3 (Apr. 29, 2019) (stating that its LPTV stations are not the functional equivalent of full power stations, even though they are carried by some MVPDs—they reach a much smaller OTA audience, must avoid causing interference to full power stations and must accept interference from full power stations, have no must carry rights and no protection for their current contours; the FCC should not cherry pick by applying full power ownership rules to LPTVs while treating them as secondary in all other respects); NPG Comments at 5-6 (explaining that smaller markets often cannot support more than one or two local sources of programming and that LPTV stations are one of the few mechanisms available for small communities to obtain network and other programming).

²³⁴ NCTA Comments at 5-7 (observing that the FCC's approval of a local TV combination that involved a station that was not consistently within the top four should be the "touchstone for any future waivers").

²³⁵ NCTA Comments at 5-8 (contending that the FCC should "make clear that the impact on retransmission consent fees is relevant to any request for a waiver" of the top-four prohibition); *2014 Quadrennial Regulatory Review*, Order on Reconsideration Order and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9838 n.239 (2017) (2017 Recon Order) (declining to adopt "specific criteria related to the issue of retransmission consent").

First, NCTA’s proposal to limit waivers to an extremely narrow set of circumstances would effectively nullify the waiver standard and completely undercut the FCC’s stated goal in adopting it, which is to “facilitat[e] transactions, in appropriate circumstances, that will allow broadcast stations to achieve economies of scale and better serve their local viewers.”²³⁶ Moreover, adopting a more stringent waiver standard would make the local TV rule more restrictive, which cannot be justified under Section 202(h) due to vastly increased competition in the media and advertising markets. Finally, placing at issue in top-four waiver requests the retrans consent fees that a local TV broadcaster may or may not be able to negotiate for in the future puts another “thumb on the scale” to benefit MVPDs in the retransmission consent marketplace, inconsistent with Section 325, and does not serve a valid public interest purpose.²³⁷ The Commission has already rejected this proposal, concluding that the case-by-case waiver review process “will allow parties to advance any relevant concerns—including concerns related to retransmission consent issues—in the context of a specific proposed transaction if such issues are relevant to the particular market, stations, or transaction.”²³⁸ NCTA has offered no valid reason for the FCC to reverse its prior determination, or to adopt any of the pay TV industry’s proposals here.²³⁹

²³⁶ 2017 Recon Order, 32 FCC Rcd at 9838.

²³⁷ Section 325(b) of the Communications Act grants broadcasters control over the retransmission of stations’ signals and was intended to create a “marketplace” in which broadcasters and MVPDs would privately negotiate the terms for the carriage of broadcast signals. See S. Rep. No. 92, 102nd Cong., 1st Sess. at 36 (1991) (stressing that it was not the intent of Congress to “dictate the outcome” of negotiations).

²³⁸ 2017 Recon Order, 31 FCC Rcd at 9838 n.239.

²³⁹ In an additional proposal, ATVA urges the FCC to investigate whether broadcaster agreements such as joint sales agreements, shared services agreements or other operating agreements are enabling broadcasters to “evade the top-four prohibition.” ATVA Comments at 21-25. Aside from the fact that many of these agreements are reviewed and approved by the FCC in connection with broadcast transactions, all of the agreements are now required

The record shows that the rapidly evolving marketplace has given rise to an almost overwhelming number of options for audiences to consume content and for advertisers to reach those audiences. Due to these changes, the current version of the local TV ownership rule is no longer necessary in the public interest as the result of competition.²⁴⁰ Proponents of the rule, such as Free Press, fail to offer evidence sufficient – or, indeed, any relevant evidence at all – to support retention of the rule. For their part, pay TV providers have failed to offer any convincing evidence supporting their proposals to retain the top-four ban, expand it beyond full power stations, or nullify the existing waiver standard. For TV stations to remain meaningful competitors in the digital marketplace, broadcasters must achieve greater economies of scale, thereby enabling necessary investments in data-driven and automated sales operations, programming and new technologies. Accordingly, NAB again urges the Commission to modernize its local TV rule by removing the *per se* restrictions that ban any combinations among top-four ranked stations and that prevent ownership of more than two stations in all markets, regardless of local competitive conditions.

V. THE FCC MAY NOT EXTEND THE CABLE PROCUREMENT TO BROADCASTING

As NAB explained in its comments, the Commission lacks statutory authority to extend its race- and gender-conscious cable procurement rule to broadcasting, and any attempt to do so would likely fall under heightened judicial scrutiny.²⁴¹ The record offers no new evidence or reasoning to alter NAB's conclusion.

to be placed in stations' online public files. Any member of the public can freely examine those agreements.

²⁴⁰ See Notice at ¶ 43; Section 202(h).

²⁴¹ See NAB Comments at 85-90.

MMTC perfunctorily asserts that the Commission has statutory authority to extend its procurement rule to broadcasters “for the same reasons” that the FCC has imposed other equal employment opportunity (EEO)-related policies on broadcasters that are not specifically required by the Communications Act.²⁴² But MMTC ignores the FCC’s statement that its authority to adopt the cable procurement rule “flows directly from the statutory mandate” in the 1984 Cable Communications Policy Act (1984 Cable Act),²⁴³ which did not include the same or any similar mandate for broadcasting. Congress, moreover, has declined to apply any procurement requirement to broadcasters despite ample opportunity during the 35 years since the 1984 Cable Act. Notably, Congress specifically addressed the FCC’s broadcast EEO rules in the 1992 Cable Television Consumer Protection and Competition Act, but still did not direct the FCC to apply a procurement rule to broadcasters. Nor did Congress move to impose the rule on broadcast stations in the 1996 Telecommunications Act or any other communications-related legislation. Given that Congress clearly knows how to apply a procurement rule to broadcasting but has chosen not to do so even when explicitly addressing the broadcast EEO rules, “its silence is controlling,” and the FCC lacks authority now to impose its cable procurement rule on broadcasters.²⁴⁴

²⁴² See MMTC Comments at 13.

²⁴³ Notice at ¶ 96. The 1984 Cable Act requires a cable system to “encourage minority and female entrepreneurs to conduct business with all parts of its operation; and . . . analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women . . .” Public L. 98-549, 98 Stat. 2779, 2798 (1984); 47 U.S.C. § 554(d)(2)(E)-(F).

²⁴⁴ NAB Comments at 87 & note 329, citing *Ela v. Destefano*, 869 F.3d 1198, 1202-1203 (11th Cir. 2017) and other cases. NAB further explained that other provisions of the Communications Act, including Section 309(j) cited by some as a source of authority for extending the cable procurement rule, did not stretch to include regulation of all the ordinary business activities of broadcasters, such as the purchase of goods and services. NAB Comments at 87-88.

MMTC also erroneously claims that broadcasters could fulfill the cable procurement rule requirements by merely ramping up outreach to minority and female entrepreneurs online and through community groups. Thus, according to MMTC, extending the rule to broadcasting would not require stations to treat minority and women entrepreneurs any differently, so that any extension of the rule would be reviewable and sustainable under “rational basis” judicial scrutiny.²⁴⁵

However, MMTC ignores the other critical part of the statutory mandate, beyond encouraging minorities and women to conduct business with all parts of its operation, which additionally requires a cable system to “analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women.”²⁴⁶ Cable systems must track the success of their performance under this mandate and certify their compliance to the Commission. Section 76.77 of the rules requires cable systems with six or more full-time employees to provide information concerning their compliance with all applicable EEO requirements on FCC Form 396-C on or before September 30th of each year.²⁴⁷ The FCC uses the information on this form to determine whether a cable system is in compliance with the EEO rules.²⁴⁸ Questions 5 and 6 in Section III of Form 396-C require cable systems to specifically certify whether they “seek out entrepreneurs in a nondiscriminatory manner and encourage them to conduct business with all parts of your organization” and “analyze the results of your efforts to recruit, hire, promote, and use services in a nondiscriminatory

²⁴⁵ See MMTC Comments at 14.

²⁴⁶ 47 U.S.C. § 554(d)(2)(F).

²⁴⁷ 47 C.F.R. § 76.77(a). These include compliance with EEO requirements concerning recruitment, hiring and promotion of cable operators’ employees, in addition to the procurement requirement.

²⁴⁸ *Id.* at § 76.77(b).

manner and use these results to evaluate and improve your EEO program.”²⁴⁹ The FCC’s rules further require cable systems to maintain records of their EEO activities to demonstrate compliance with the EEO rules,²⁵⁰ as well as records sufficient to verify the accuracy of information provided on Form 396-C, plus any supplemental investigation responses that may be required.²⁵¹

Extending the procurement rule obviously would require broadcasters to do much more than simply expand outreach to minority and female entrepreneurs. The requirements to track, record, analyze, certify and, at times, provide additional information on their efforts to seek out minority and female entrepreneurs would place unavoidable pressure on broadcasters to treat these classes of entrepreneurs differently than others, thereby triggering heightened judicial scrutiny. As noted in NAB’s comments, the D.C. Circuit in 2001 struck down a previous version of the FCC’s broadcast EEO rules, holding that FCC policies pressuring broadcasters to recruit or reach out to job candidates based on racial identity would invoke strict scrutiny.²⁵² Thus, even the prospect of an audit or other review of broadcasters’ efforts to comply with a procurement requirement would improperly pressure broadcasters to obtain goods and services from minorities and women to avoid a Commission investigation and/or enforcement action.

²⁴⁹ See <https://transition.fcc.gov/Forms/Form396C/396c.pdf>.

²⁵⁰ 47 C.F.R. § 76.77(d).

²⁵¹ *Id.*

²⁵² *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 20-21 (D.C. Cir. 2001) (holding that EEO reporting requirements were subject to strict scrutiny because they would pressure broadcasters to focus their recruitment efforts on minorities and women to avoid FCC investigation, and invalidating the requirements as not narrowly tailored to further a compelling government interest).

Notably, the Commission adopted its cable procurement rules in 1985, pursuant to a 1984 statute, a decade before the Supreme Court decided the two cases setting the current standards for governmental adoption of race- and gender-based classifications. As the FCC made clear in its 2016 ownership order, its discretion to adopt race-conscious measures was significantly constrained under *Adarand*, which bars a government actor from such measures unless it can show they are narrowly tailored to further a compelling governmental interest.²⁵³ Similarly, any FCC gender-based measure would be subject to intermediate scrutiny and sustained only if the measure was substantially related to the achievement of an important objective.²⁵⁴

MMTC and other parties neglect to even acknowledge *Adarand* or *Virginia*. Free Press, for its part, accuses the Commission of “undercutting diversity initiatives,” including expansion of the cable procurement rule, by seeking comment on how these initiatives may be made race- and gender-neutral to avoid legal impediments.²⁵⁵ While these parties may not care about such legal niceties, NAB continues to believe that diversity of broadcast station ownership will not be enhanced by FCC measures unlikely to withstand judicial scrutiny, especially in the absence of a specific congressional mandate for those measures.

VI. CONCLUSION

Despite the focus on competition in the broadcast provisions of the 1996 Act generally and in Section 202(h) specifically, those commenters decrying any relaxation of

²⁵³ 2016 Ownership Order, 31 FCC Rcd at 9961, 9986-98, discussing relevant case law including *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995); see also NAB Comments at 89-90.

²⁵⁴ *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); see 2016 Ownership Order, 31 FCC Rcd at 9986-98 (also discussing the standard for adopting gender-based measures).

²⁵⁵ Free Press Comments at 15 (citing Notice at ¶ 98). Like MMTC, Free Press also fails to address the D.C. Circuit’s decision in *MD/DC/DE Broadcasters Association*.

the existing local radio and TV rules avoid any serious discussion or analyses, supported by empirical evidence, showing that the current rules “are necessary in the public interest as the result of competition.” In contrast, NAB and other parties have provided significant data and evidence demonstrating that competition for audiences and advertisers in the digital marketplace is fierce and flourishing and that consumers today enjoy almost too much choice of content, accessible at any time and from (almost) anywhere via multiple devices.

Given the record in this proceeding, the Commission can no longer maintain that local broadcast radio and TV stations compete only against a handful of other geographically proximate radio and TV stations. That analog marketplace disappeared in the previous century. NAB and our members urge the FCC to adopt ownership rules reflecting actual competitive conditions in the 21st century media and advertising markets.

Respectfully submitted,

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May 29, 2019

Attachment A

NAB Analysis of ATVA Markets

Overview		
# Full Power Comm Stations <4	Number of ATVA Markets	% Markets <4 FP Comm Stations
49	86	57%

Detail		
TV Market Per ATVA	Market Rank	Kagan full power commercial station count
Albany, GA	152	4
Albuquerque-Santa Fe, NM	47	21
Alexandria, LA	179	4
Alpena, MI	208	1
Augusta-Aiken, GA-SC	105	3
Bakersfield, CA	122	4
Bangor, ME	155	3
Beaumont-Port Arthur, TX	140	3
Bend, OR	186	2
Biloxi-Gulfport, MS	156	2
Binghamton, NY	160	3
Bluefield-Beckley-Oak Hill, WV	163	4
Bowling Green, KY	181	2
Butte-Bozeman, MT	185	4
Casper-Riverton, WY	198	8
Charlottesville, VA	183	2
Chattanooga, TN	83	6
Cheyenne-Scottsbluff, WY-NE	197	4
Clarksburg-Weston, WV	170	3
Columbia-Jefferson City, MO	136	4
Columbus-Tupelo-West Point-Houston, MS	133	3
Dothan, AL	173	3
Duluth-Superior, MN-WI	144	7
Elmira (Corning), NY	176	3
Evansville, IN	103	4
Fairbanks, AK	202	3
Fargo, ND	117	9
Ft. Smith-Fayetteville-Springdale-Rodgers,	101	6

Ft. Wayne, IN	104	5
Glendive, MT	210	1
Grand Junction-Montrose, CO	187	5
Great Falls, MT	192	3
Greenwood-Greenville, MS	193	2
Harrisonburg, VA	175	1
Hattiesburg-Laurel, MS	168	2
Helena, MT	205	1
Idaho Falls-Pocatello (Jackson), ID-WY	161	4
Jackson, TN	177	2
Johnstown-Altoona-State College, PA	106	5
Jonesboro, AR	180	2
Joplin-Pittsburg, MO-KS	153	4
Juneau, AK	207	3
Lafayette, IN	188	1
Lafayette, LA	121	4
Lake Charles, LA	172	2
Laredo, TX	184	2
Lima, OH	190	2
Lincoln & Hastings-Kearny, NE	111	8
Macon, GA	118	5
Mankato, MN	199	1
Marquette, MI	182	5
Meridian, MS	191	3
Minot-Bismarck-Dickinson (Williston), ND	146	10
Missoula, MT	164	4
Monroe-El Dorado, LA-AR	137	3
Monterey-Salinas, CA	126	4
North Platte, NE	209	1
Ottumwa-Kirksville, IA-MO	200	2
Palm Springs, CA	145	2
Panama City, FL	150	5
Parkersburg, WV	194	1
Peoria-Bloomington, IL	113	5
Presque Isle, ME	206	1
Quincy-Hannibal-Keokuk, IL-MO-IA	174	3
Rapid City, SD	171	7
Salisbury, MD	138	2
Santa Barbara-Santa Maria-San Luis Obispo, CA	124	5
Sherman-Ada, TX-OK	159	2
South Bend-Elkhart, IN	99	4

Springfield, MO	72	5
Springfield-Holyoke, MA	108	2
St. Joseph, MO	201	2
Tallahassee-Thomasville, FL-GA	112	5
Terre Haute, IN	158	3
Topeka, KS	141	3
Traverse City-Cadillac, MI	120	8
Tri-Cities, TN-VA	102	5
Twin Falls, ID	189	1
Utica, NY	169	3
Victoria, TX	203	2
Watertown, NY	178	2
Wausau-Rhineland, WI	134	6
Wheeling-Steubenville, WV-OH	162	2
Wilmington, NC	129	3
Youngstown, OH	125	3
Yuma-El Centro, AZ-CA	166	5

Source: Analysis of Kagan "TV Stations by Market and Affiliation" database as of October 15, 2018.

NAB Analysis of NCTA Markets

Overview		
# Full Power Comm Stations <4	Number of NCTA Markets	% Markets <4 FP Comm Stations
46	84	55%

Detail		
TV Market Per NCTA	Market Rank	Kagan full power commercial station count
Albany, GA	152	4
Albuquerque	47	21
Alexandria, LA	179	4
Alpena, MI	208	1
Augusta-Aiken-GA	105	3
Bakersfield-CA	122	4
Bangor, ME	155	3
Beaumont-Port Arthur-TX	140	3
Bend, OR	186	2
Biloxi-Gulfport-MS	156	2
Binghamton-NY	160	3
Bluefield-Beckley-Oak Hill-WV	163	4
Bowling Green, KY	181	2
Butte-Bozeman-MT	185	4
Casper-Riverton-WY	198	8
Charlottesville, VA	183	2
Chattanooga	83	6
Cheyenne-Scottsbluff-WY-NE	197	4
Clarksburg-Weston-WV	170	3
Columbia-Jefferson City-MO	136	4
Columbus-Tupelo-West Point-Houston-MS	133	3
Dothan, AL	173	3
Duluth-Superior-MN-WI	144	7
Elmira (Corning)-NY	176	3
Eureka, CA[2]	195	5
Evansville, IN	103	4
Fairbanks, AK	202	3

Fargo	117	9
Fort Smith-Fayetteville-Springdale-Rogers-AR	101	6
Fort Wayne, IN	104	5
Glendive, MT	210	1
Grand Junction-Montrose-CO	187	5
Great Falls, MT	192	3
Greenwood-Greenville-MS[1]	193	2
Harrisonburg, VA	175	1
Hattiesburg-Laurel-MS	168	2
Helena, MT	205	1
Idaho Falls-Pocatello-ID-WY	161	4
Jackson, TN	177	2
Johnstown-Altoona-State College-PA	106	5
Jonesboro, AR	180	2
Joplin-Pittsburg-MO-KS	153	4
Juneau, AK	207	3
Lafayette, LA	121	4
Lake Charles, LA	172	2
Laredo, TX	184	2
Lima, OH	190	2
Lincoln & Hastings-Kearney-NE	111	8
Macon	118	5
Mankato, MN	199	1
Marquette, MI	182	5
Meridian, MS	191	3
Minot-Bismark-Dickinson-ND	146	10
Missoula, MT	164	4
Monroe-El Dorado-LA-AR	137	3
Monterey-Salinas-CA	126	4
North Platte, NE	209	1
Ottumwa-Kirksville-IA-MO	200	2
Panama City-FL	150	5
Parkersburg, WV	194	1
Peoria-Bloomington-IL	113	5
Presque Isle, ME	206	1
Quincy-Hannibal-Keokuk-IL-MO-IA	174	3
Rapid City, SD	171	7
Santa Barbara-Santa Maria-San Luis Obispo-CA	124	5

Sherman-Ada-TX-OK	159	2
South Bend-Elkhart-IN	99	4
Springfield-Holyoke-MA	108	2
Springfield-MO	72	5
St. Joseph, MO	201	2
Tallahassee-Thomasville-FL-GA	112	5
Terre Haute, IN	158	3
Topeka, KS	141	3
Traverse City-Cadillac-MI	120	8
Tri-Cities-TN-VA	102	5
Twin Falls, ID	189	1
Utica, NY	169	3
Victoria, TX	203	2
Wausau-Rhineland-WI	134	6
Watertown, NY	178	2
Wheeling-Stuebenville-WV-OH	162	2
Wilmington, NC	129	3
Youngstown, OH	125	3
Yuma-El Centro-AZ-CA	166	5

Source: Analysis of Kagan "TV Stations by Market and Affiliation" database as of October 15, 2018.