June 21, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Written *Ex Parte* Communication, MB Docket Nos. 14-50, 09-182

Dear Ms. Dortch:

In light of the U.S. Court of Appeals for the Third Circuit's recent ownership decision, the continuing rapid competitive and technological changes in the media marketplace and the record in the above-captioned proceedings, the Commission must act expeditiously to reform its outdated and inequitable broadcast ownership rules. For the reasons discussed below and in our previous submissions, NAB urges the FCC to eliminate the newspaper/broadcast cross-ownership rule and the last remnant of the radio/television cross-ownership rule. NAB also strongly urges the FCC to significantly reform the local television ownership rule by eliminating the wholly arbitrary and unrealistic eight-voices test and reforming the top-four restriction to allow a single entity to own up to two of the top-four rated stations in a local market.

Section 202(h) of the Telecommunications Act of 1996 requires the FCC to review its broadcast ownership rules every four years, determine whether they remain necessary in the public interest "as the result of competition," and repeal or modify those that are not. In 2014, NAB challenged the FCC's order declining to make a final decision in its 2010 quadrennial ownership review and rolling that review into the newly-initiated 2014 review, while at the same time determining to attribute most same-market television joint sales agreements (JSAs).[1]

On May 25, the Third Circuit Court of Appeals faulted the FCC for failing to conclude its "mandatory" quadrennial ownership reviews.[2] The Court stressed that the "very purpose of § 202(h) – to function as an 'ongoing mechanism to ensure that the Commission's regulatory

[1] *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371 (2014) (2014 Quadrennial FNPRM).

[2] *Prometheus Radio Project v. FCC*, Nos. 15-3863, 15-3864, 15-3865 & 15-3866, at 35 (3d Cir. May 25, 2016) (*Prometheus III*) (quoting Section 202(h) and noting its "repeated use" of the word "shall," which "creates an obligation impervious to . . . discretion") (citations omitted).

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framework would keep pace with the competitive changes in the marketplace'—reinforces the need for timeliness."[3] The Court specifically discussed the costs of keeping the ownership rules "in limbo," pointing to the newspaper/broadcast cross-ownership rule in particular as a "telling example of why the delay is so problematic."[4] In addition, the Court vacated the FCC's decision attributing TV JSAs because that action made the ownership rules "more stringent," even though the FCC had not yet determined whether those rules remained sound.[5] The Court concluded that the FCC's failure to justify the preexisting scope of the ownership rules through a final quadrennial review decision made invalid under Section 202(h) the FCC's JSA decision expanding the reach of those rules.[6]

The Commission Should Eliminate the Cross-Ownership Rules

In its opinion, the Third Circuit singled out the newspaper/broadcast cross-ownership rule, observing that the "1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest."[7] NAB strongly agrees that this rule is outdated, and has long urged the FCC to eliminate it. In various submissions, NAB has demonstrated that the newspaper cross-ownership prohibition: (1) affirmatively harms localism, as shown in numerous studies;[8] (2) exacerbates the perilous state of the newspaper industry, which is characterized by lack of investment, plummeting revenue, reduced circulation, cut backs in staff and services, and the closing of papers;[9] and (3) is not needed to promote viewpoint diversity, given the myriad options consumers today have for obtaining news and information of all types, particularly via online platforms and outlets.[10]

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[3] *Id*. at 36 (omitting internal citation and quoting *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004)).

[4] *Id*. at 37.

[5] *Id*. at 52.

[6] *Id.* at 51-52.

[7] *Id*. at 38.

[8] *See* Comments of NAB, MB Docket Nos. 14-50, *et al*., at 73-77, 83 (Aug. 6, 2014) (NAB 2014 Comments) (identifying 15 studies showing that TV stations cross-owned with newspapers produced more and/or higher quality news and other non-entertainment programming than non-cross-owned stations, and two additional studies showing similar localism benefits from newspaper/radio cross-ownership).

[9] *See, e.g.*, NAB 2014 Comments at 31-38; 70-73; Pew Research Center, *State of the News Media 2016*, at 4, 9 (June 2016) (finding that in 2015, newspaper industry had "perhaps the worst year since the recession," with circulation, advertising revenue and newsroom employment all falling significantly).

[10] *See, e.g.*, NAB 2014 Comments at 18-31; 77-83. More recent reports and surveys have demonstrated that consumers' reliance on outlets other than or in addition to newspapers and broadcast stations continues to increase. *See, e.g.,* Pew Research Center, *15 striking findings from 2015* (Dec. 22, 2015), http://www.pewresearch.org/fact-tank/2015/12/22/15-striking-findings-from-2015/ (finding that (i) for news about politics and government, social media may be for the millennial generation what local TV is for baby boomers; and (ii) reporters for niche outlets and digital start-ups now outnumber journalists who work for daily newspapers in the Senate press gallery); Pew Research Center, *The Evolving Role of News on Twitter and Facebook* (July 14, 2015), http://www.journalism.org/files/2015/07/Twitter-and-News-Survey-Report-FINAL2.pdf (demonstrating that Americans across all age groups are increasingly using Facebook and Twitter as sources of news and that these numbers grew substantially between 2013 and 2015).

The Commission has consistently stated that the newspaper cross-ownership rule is not needed to promote competition, but has continued to cling to this rule as necessary to promote viewpoint diversity.[11] While a reasonable concern in 1975 – and perhaps even in 1995 when only 14 percent of Americans used the Internet[12] -- this rationale has lost its force in an age of Internet ubiquity.[13] In other contexts, the Commission has recognized that the Internet "fosters diversity," "enables people to build communities," and has "low barriers to entry for developers of new content, applications, services, and devices."[14] It would be arbitrary and capricious, and inconsistent with Section 202(h), for the Commission to continue justifying retention of the newspaper cross-ownership rule by discounting, if not virtually ignoring, digital technology's transformation of the media marketplace and the Internet's almost infinite content, applications and services.[15]

Consistent with the requirements of Section 202(h), the Commission also must remove the last restrictions on the cross-ownership of radio and television stations.[16] The FCC tentatively concluded in 2011 that the radio/TV cross-ownership rule was no longer "necessary to promote the public interest."[17] Since 2011, the media marketplace has only become more competitive and diverse, and no commenter in the pending proceedings has presented empirical evidence showing that elimination of the rule would harm viewpoint diversity. Especially in light of the limited effects of the remaining radio/TV cross-ownership restrictions,[18] the existence of separate local radio and local TV ownership rules, and multiple studies finding that radio/TV cross-ownership promotes localism,[19] retention of this rule would be contrary to Section 202(h) and arbitrary and capricious.

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[11] *See* 2014 Quadrennial FNPRM, 29 FCC Rcd at 4434; *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 at ¶ 89 (2011) (2010 Quadrennial NPRM).

[12] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5564 (2014) (Open Internet NPRM).

[13] According to the Center for the Digital Future, 91 percent of Americans reported using the Internet in 2014, and usage was 100 percent in younger demographic groups. *The 2015 Digital Future Report: Surveying the Digital Future*, *Year Thirteen*, Center for the Digital Future, USC Annenberg School for Communication and Journalism, at 15-16 (2015).

[14] Open Internet NPRM, 29 FCC Rcd at 5563. Public interest groups similarly have lauded the ability of the Internet "to eradicate the barriers to entry present in traditional communications markets," citing the lack of traditional media gatekeepers and the "unlimited number of 'channels.'" Comments of Free Press, GN Docket No. 09-191, at 9 (Jan. 14, 2010) (noting the importance of the Internet to civic engagement, including the ability of citizens to reach more readers online and of politicians to speak directly to voters).

[15] As the Supreme Court recognized as early as 1997, the Internet allows consumers anywhere access to "content" as "diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

[16] *See, e.g.,* NAB 2014 Comments at 85-88.

[17] 2010 Quadrennial NPRM, 26 FCC Rcd 17489 at ¶ 119.

[18] The rule, for example, already permits common ownership of one or two TV stations with up to six or seven radio stations; thus, repeal of the rule would only permit the common ownership of one or two additional radio stations, in conjunction with a TV station, in the largest radio markets. *See* NAB 2014 Comments at 85.

[19] *See* NAB 2014 Ownership Comments at 85-86 & n. 290-291 (citing five studies showing that cross-ownership of radio and TV stations produces public benefits, including greater amounts of news and public affairs programming).

The Commission Should Significantly Reform the Local TV Ownership Rule

The current local TV ownership rule prevents the common ownership of two broadcast TV stations in most Designated Market Areas (DMAs) through the combination of the eight voices/top-four restrictions.[20] Neither part of the current rule reflects marketplace realities, as NAB has long argued and as explained below. We urge the FCC to remove the eight-voices test and reform the top-four prohibition by allowing a single entity to own up to two of the top-four rated stations in a local market.

As an initial matter, the eight-voices test erroneously assumes that broadcast TV stations exist in a separate competitive universe that lacks multichannel video programming distributors (MVPDs), the Internet, online and mobile video services and all other competitors. That assumption is contrary to reality. NAB has previously demonstrated in detail that broadcast TV stations compete against MVPDs and online providers for viewers and advertisers.[21] A local TV ownership restriction based on an outdated theory that only competition from a single type of outlet matters is arbitrary and capricious.[22] This position also is contrary to Section 202(h)'s directive that the FCC's "regulatory framework [] keep pace with the competitive changes in the marketplace."[23]

Even on its own terms, however, the eight-voices standard makes no sense. The FCC intended the eight-voices test to help ensure that each market has a minimum of four stations affiliated with the "Big Four" networks and four independently owned stations unaffiliated with these major networks before any common ownership is permitted.[24] This standard is wholly unrealistic, and the FCC has not, and apparently cannot, demonstrate that eight independently owned full power TV stations are necessary to preserve competition in local markets. *The majority of DMAs do not even have eight full power stations*, and neither the Commission nor any commenter has shown that those markets suffer from a lack of competition that harms viewers or advertisers.[25] The FCC's failure to identify and analyze any

[20] Specifically, no two TV stations may be commonly owned in the same market unless, after the combination, a minimum of eight independently owned and operating full-power commercial and non-commercial TV stations would remain in that market. In addition, no combinations may be formed among the top-four rated stations in the same market based on all-day audience share. 47 C.F.R. § 73.3555(b).

[21] *See, e.g.,* NAB 2014 Comments at 31-50; NAB Written *Ex Parte* Communication, MB Docket Nos. 14-50; 09-182, at 5-10 (June 6, 2016). A 2014 study by Economists Incorporated found "no empirical evidence" supporting the position that local broadcast TV stations compete only with other TV stations for advertising, and concluded that a "properly defined" market would include non-broadcast alternatives such as cable. *See* Kevin Caves and Hal Singer, Economists Incorporated, *Competition in Local Broadcast Television Advertising Markets*, at 3-4 (Aug. 6, 2014), Attachment A to NAB 2014 Comments.

[22] *See, e.g.*, NAB 2014 Comments at 9-17.

[23] *Prometheus III* at 36 (citations omitted). *See also* NAB 2014 Comments at 3-17.

[24] 2014 Quadrennial FNPRM, 29 FCC Rcd at 4394.

[25] Indeed, some small markets do not have stations affiliated with all four major networks, let alone any additional stations. In these markets, even those stations affiliated with major networks often struggle to maintain profitability, but cannot form more viable ownership structures due to the eight-voices test. *See, e.g.,* NAB 2014 Comments at 55-57 & Att. D; Comments of NAB, MB Docket No. 09-182, at Att. B (Mar. 5, 2012); Comments of NAB, MB Docket No. 09-182, at 78-81 & Att. C (July 12, 2010). Following the incentive auction, the

purported distinctions between markets with fewer than eight stations, and those with eight or more broadcast TV voices, alone renders the continued retention of the rule arbitrary and capricious.

Beyond this complete lack of an evidentiary basis, the FCC also has not offered any meaningful rationale for its assertion that four additional (rather than say, two) independent stations are essential to maintaining competition.[26] The eight-voices test, moreover, does not promote the maintenance of independently-owned local news operations because, *according to the Commission*, top-four stations are the ones most likely to offer local news.[27] Finally, the FCC's claim that four additional independent stations are important for competition is inconsistent with its position discussed below that the top-four stations in a market are by far the strongest competitors. If that is the case, then the mere existence of additional, significantly weaker independent stations in a market will not provide effective competition to the top-four network affiliates, especially in the provision of news and other locally-oriented programming. For all these reasons, the FCC should eliminate the inconsistent, unsupported and arbitrary eight-voices test.

The FCC's rationale for the top-four restriction also is flawed. The Commission argues that a natural break point exists between the fourth and fifth ranked TV stations in local markets and that combinations among top-four stations would result in one firm having a "significantly larger market share than other firms in the market," thereby harming competition.[28] This argument must fail because it similarly relies on the erroneous proposition that broadcast TV stations are the only relevant competing firms in local media markets, and ignores all other outlets and platforms.

But again taking the FCC's rule on its own terms, NAB has submitted multiple empirical analyses showing that the notion of a natural break point between just the fourth- and fifth-ranked stations is not consistently supported by the facts, and is not common enough throughout all markets to justify an across-the-board rule. Particularly in small to medium-sized markets, the top one or two stations often earn significantly higher revenue and ratings than other stations in the market, and more significant breaks exist between either the first and second ranked stations, the second and third ranked stations, or the third and fourth ranked stations.[29] In fact, due to the large disparities among top-four stations, NAB has

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number of stations in many local markets will shrink, making the eight-voices standard even less grounded in marketplace realities.

[26] *See, e.g.,* NAB 2014 Comments at 55-56; NAB Comments, MB Docket No. 09-182, at 27-29 (Mar. 5, 2012).

[27] *See* 2010 Quadrennial NPRM, 26 FCC Rcd 17489 at ¶ 41 & n. 92-93; *see also Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12933 (1999) ("our analysis has indicated that the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved").

[28] 2014 Quadrennial FNPRM, 29 FCC Rcd at 4389-90.

[29] *See, e.g.,* Reply Comments of NAB, MB Docket No. 09-182, at 12-13 & Att. A, Mark R. Fratrik, BIA/Kelsey, *Reforming Local Ownership Rules: Station and Market Analyses* (Apr. 17, 2012) (2012 Ownership Replies). The FCC insists that a "significant cushion" between the fourth and fifth ranked stations continues to exist in "most" markets. 2014 Quadrennial FNPRM, 29 FCC Rcd at 4390 & n.111. It fails, however, to indicate how many markets; the size of this cushion across different markets and how the cushion between the fourth and fifth

shown that even the combination of the revenue and/or audience share of the third- and fourth-ranked stations is less, often very substantially less, than the revenue or ratings of the top-ranked stations in numerous markets, especially smaller ones where the local TV ownership rule prohibits any combinations.[30] Permitting such combinations would not result in one TV broadcaster dominating a local market, even if treating TV stations as the only relevant competitors and arbitrarily ignoring competition from all other outlets.[31] For these reasons, the Commission should remove its blanket top-four restriction from the local TV rule.

Given that the Commission has stated since its 2006 review that the purpose of the local TV ownership rule is to promote competition, rather than diversity,[32] and that traditional antitrust enforcement operates to maintain competition, a strong argument can be made that no further regulation beyond antitrust is needed. At the very least, however, the Commission should replace the top-four prohibition with one permitting common ownership of up to two of the top-four rated stations in any local market. Aside from this restriction, local broadcasters should be free to engage in station combinations that comply with antitrust law. In a video marketplace characterized by unprecedented competition for viewers and advertisers from multichannel, mobile and online providers, more limited FCC regulation, coupled with antitrust regulation, should be more than sufficient to maintain healthy competition.

Finally, NAB stresses that the recently commenced TV spectrum incentive auction provides no basis for the Commission to refrain from concluding its 2010 and 2014 quadrennial reviews in the time frame noted by the Third Circuit.[33] It also provides no excuse for the Commission to ignore its Section 202(h) mandate to determine whether to repeal or modify ownership

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ranked stations compares to the cushion between the top four stations in various markets; how it determines whether a cushion is large enough to be "significant"; and how it decides if the cushion between the fourth and fifth ranked stations exists in a sufficient number of markets to justify an across-the-board rule applicable to all markets. Given this notable lack of an evidentiary basis supporting it, the top-four restriction is arbitrary and capricious.

[30] 2012 Ownership Replies at 12-13 & Att. A (showing that the combination of the revenues of the third- and fourth-ranked station is less than the revenue of the top-earning station in 82 of the 159 markets with at least four full power commercial TV stations, and that only six of these 82 markets are in the top 50). A more recent analysis utilizing ratings data showed that in 80 of the 157 markets that have four or more full power commercial stations, the combination of the all-day audience share of the third and fourth rated stations is less than the top rated station. *See* NAB 2014 Comments at 52 & n. 160. *See also id*. at 52-54 & Att. B, Mark R. Fratrik, BIA/Kelsey, *Local Television Station Revenue Share Analysis: An Update* (July 23, 2014) (showing similar results for an updated revenue analysis).

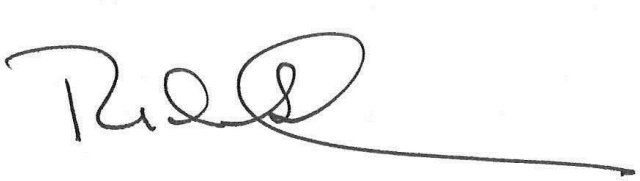
[31] In small markets particularly, allowing such combinations would help create additional viable competitors and often would not result in the combination of two stations each independently producing local news. The FCC previously found that only 22.5 percent of the markets with six or fewer TV stations receive daily local news from at least four stations. 2010 Quadrennial NPRM, 26 FCC Rcd 17489 at ¶ 53 n. 117. In fact, only 58 percent of *all* TV markets have four or more stations providing at least 30 minutes of local news per day. *Id*. at n. 92.

[32] In its order concluding the 2006 quadrennial, the FCC stated that the local TV ownership rule "promotes competition for viewers and advertisers" in local markets and that the "rule is no longer necessary to foster diversity." *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2064-66 (2008) (noting that the "cross-ownership rules," not "single-service" ownership restrictions, "are designed to foster viewpoint diversity"). *See also* 2010 Quadrennial NPRM, 26 FCC Rcd 17489 at ¶¶ 25-26.

[33] *Prometheus III* at 42 (stating that the court "fully anticipate[s]" that the FCC will meets its deadline of the end of this year for finalizing and adopting an order).

rules no longer necessary in the public interest. Both Congress and the Commission have recognized that an incentive auction inevitably would result in a decrease in the number of TV station licensees. Indeed, that is the stated purpose of the auction – to persuade broadcasters "to relinquish some or all of their spectrum usage rights" and to "clear the highest possible amount of spectrum for broadband."[34] Because Congress and the Commission already have decided that reducing the number of TV stations will serve the public interest,[35] the Commission cannot properly use that public interest judgment as a basis to further delay fulfilling its obligations under Section 202(h) and modernizing its ownership rules to reflect today's marketplace.

Respectfully submitted,



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[34] FCC Chairman Tom Wheeler, Blog, *Crafting Balanced Incentive Auction Rules in the Public Interest* (June 17, 2015), https://www.fcc.gov/news-events/blog/2015/06/17/crafting-balanced-incentive-auction-rules-public-interest.

[35] *See, e.g., Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* Report and Order, 29 FCC Rcd 6567, 6570 (2014) (auction will allow reallocation of spectrum to "its highest and best use"); Spectrum Act §§ 6403(a)(1), (c)(1)(A) (mandating both a reverse and a forward auction to repurpose broadcast TV spectrum).