Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	)))	MB Docket No. 17-318

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

"[C]hanges in the television landscape should have <u>no impact</u> on how the Commission should view its ownership rules."[1]

This ludicrous assertion made by one commenter in this proceeding epitomizes precisely why the Commission should reject the views of those parties supporting more stringent limits on the ability of TV broadcasters – and only TV broadcasters – to reach the American people. In fairness, these parties must make this argument, for if the FCC finds that the video landscape has changed, it would have no justification whatsoever to further restrict broadcasters' ability to reach viewers.

In its initial comments, the National Association of Broadcasters (NAB)[2] proposed that the Commission retain the 39 percent national TV audience reach limit and determine compliance with it by accounting for all TV stations at 50 percent of their theoretical audience reach. We explained that the presumption of 100 percent audience reach underlying the national cap is completely disconnected from the current reality of TV

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[1] Comments of Nexsmax Media, Inc., MB Docket No. 17-318, at 5 (Mar. 19, 2018) (emphasis added).

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

viewership. Commenters seeking to repeal the so-called "UHF discount" on the basis it no longer reflects technical reality simultaneously turn a blind eye to the fact that, in the first instance, no TV stations are viewed by 100 percent of the households in their markets. As NAB previously discussed, the current audience reach metric greatly exaggerates the competitively effective reach of TV stations whose actual audiences and advertising revenues have been fragmented by ever-increasing competition from a growing range of multichannel and online video providers. In light of these competitive conditions, the Commission would have no basis for reducing the existing level of TV station ownership permitted nationwide, whether by lowering the 39 percent cap or by accounting for stations at their artificially presumed 100 percent reach.[3] NAB now replies to certain comments in this proceeding, none of which undermine our proposal and supporting arguments.

* * * * *

Those commenters opposed to the Commission maintaining or modernizing the national TV ownership rule present arguments riddled with holes and inconsistencies. As an initial matter, these parties argue that the Commission lacks authority to modify or eliminate the 39 percent national TV audience reach cap, but also assert that the FCC somehow possesses the authority to make the cap more stringent by altering the method of calculating compliance with it by repealing the UHF discount. To be clear, these parties contend that the FCC lacks statutory authority to modify the national audience reach cap by making it *less* restrictive but possesses the authority to make it *more* restrictive. This argument is contrary to prior FCC decisions; inconsistent with the specific language of the

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[3] *See* Comments of NAB, MB Docket No. 17-318, at 22-29 (Mar. 19, 2018); *see also id*. at 29-34 (explaining in detail how NAB's proposal treats all stations more rationally and equitably and avoids unnecessary disruption for TV stations and their viewers).

2004 Consolidated Appropriations Act and the 1996 Telecommunications Act; lacking in logic; and outcome determinative in the extreme.

These commenters also completely fail to justify greater restrictions on TV broadcasters on an evidentiary basis. Many simply did not examine the current digital marketplace, submitting comments including *no* references whatsoever to online video or the internet, or at most making only passing references to the internet – the platform that the FCC regards as America's most important for economic growth, innovation, competition and free expression. And the few commenters deigning to mention online video and the internet do not engage in any serious analysis of the video marketplace. These parties, for example, focus primarily on rhetorical references to "broadcast conglomerates," or appear to live in an alternate video universe where broadcast TV "remains dominant." This latter contention can be refuted by citing a single statistic. During any given minute of prime time in 2017, only *7.9 percent* of the estimated 128.9 million people ages 18-49 in U.S. TV households (the audience most coveted by advertisers) were viewing broadcast television.

Given the limited effective reach of TV stations in today's highly competitive video marketplace, it would be arbitrary and capricious for the FCC to make the national TV rule more restrictive, whether by reducing the 39 percent cap or by altering the method of calculating compliance with it. Indeed, NAB has shown in response to the FCC's inquiry that current video "market characteristics . . . warrant discounting or weighting a station's audience reach when determining compliance with a national cap."[4] Accounting for all TV stations at half their theoretical 100 percent audience reach, as NAB proposes, still

[4] Notice of Proposed Rulemaking, MB Docket No. 17-318, FCC 17-169, at ¶ 21 (rel. Dec. 18, 2017) (Notice).

overstates their effective marketplace reach and would be a conservative method of attributing stations under a 39 percent national cap.

The Commission also should reject the self-serving calls from pay-TV industry commenters for stricter regulation of TV station ownership. Pay-TV providers here repeat their tired claims about broadcasters' alleged undue bargaining power in retransmission consent negotiations. NAB has explained in detail in multiple FCC filings that pay-TV providers' arguments have no merit, as they ignore the concentrated nature of the multichannel video distribution and broadband markets and the diffuse nature of the video programming marketplace.

Pay-TV commenters further assert, based on an earlier economic analysis of DISH's confidential data, that the larger the broadcast station group, the higher the retransmission price paid by DISH. Even assuming the accuracy of their assertion and the validity of DISH's analysis (which NAB cannot verify and which has been disputed in another FCC proceeding), their claim says little about whether those retransmission fees are actually anticompetitive, let alone anticompetitive due to broadcaster market power. In fact, the most obvious explanation for the reported difference in the retransmission fees paid to large and small broadcasters rests with *DISH's* market power. Notably, an earlier review of DISH's analysis found that the relationship DISH alleges between broadcast station group size and retransmission fees was driven by comparing the fees DISH pays to very small broadcasters, including many single-station owners, to those paid to substantially larger TV station groups. If DISH, as it asserts, is unable to negotiate the same low retransmission fees with large station groups as it does with very small broadcasters, this merely suggests that large groups are able to negotiate with large pay-TV providers on a more level playing field than the smallest station owners. The pay-TV industry's preference for negotiating with smaller, weaker broadcasters, however, is not evidence that larger groups possess harmful market power. And this self-interested preference provides no factual or legal support for imposing more stringent disparate regulation on broadcast TV stations.

In sum, the Commission should reject the calls of some commenters for a stricter national TV ownership rule and ensure that its rule fully reflects the digital transformation of the video marketplace. Unlike certain commenting parties, the FCC cannot lawfully ignore the realities of the video landscape in which TV broadcasters' effective reach has declined due to fierce competition for viewers and, ultimately, advertisers from many other distributors and programmers. The Commission should adopt NAB's proposal, which accounts for the arbitrary audience reach metric underlying the national TV rule and which treats all TV stations more rationally and consistently.

II. ARGUMENTS THAT THE FCC LACKS AUTHORITY TO MODIFY OR ELIMINATE THE NATIONAL CAP, YET POSSESSES AUTHORITY TO REPEAL THE UHF DISCOUNT, ARE CONTRARY TO STATUTORY LANGUAGE, FCC DECISIONS AND COMMON SENSE

Commenters supporting a more restrictive limit on TV station ownership nationwide almost uniformly argue that the Commission lacks authority to modify or eliminate the 39 percent national TV audience reach cap, but possesses the authority to make the cap more stringent by altering the method of calculating compliance with it by repealing the UHF discount.[5] The FCC already has rejected this nonsensical argument,[6] which is inconsistent

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[5] *See, e.g.*, Comments of Free Press, MB Docket No. 17-318, at 5-7, 17-21 (Mar. 19, 2018); Comments of DISH Network, L.L.C., MB Docket No. 17-318, at 12-15 (Mar. 19, 2018); Revised Comments of the Attorneys General of the States of Illinois, California, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island, and Virginia, MB Docket No. 17-318, at 4-9 (Feb. 27, 2018); Newsmax Comments at 3-5; Comments of Public Interest Commenters, MB Docket No. 17-318, at 1-2 (Mar. 19, 2018). *But see* Comments of Consumers Union, The Advocacy Division of Consumer Reports, MB Docket No. 17-318, at 2, 5 (agreeing with the FCC that it has authority to adjust the cap and repeal the UHF discount).

[6] *See, e.g.,* Order on Reconsideration, 32 FCC Rcd 3390, 3398 n.60 (2017) (2017 UHF Recon Order) (observing that if the FCC lacks "authority to modify the cap, then it follows

with the specific language of the 2004 Consolidated Appropriations Act (CAA) and the 1996 Telecommunications Act (1996 Act), lacking in logic and outcome determinative in the extreme.

A. The Specific Language Used by Congress Does Not Prohibit the FCC from Modifying or Repealing the National TV Cap

NAB finds it telling that parties arguing that the FCC lacks authority to modify or eliminate the national audience reach cap neglect to cite the exact language in either Section 629(1) of the CAA or Section 202(c)(1)(B) of the 1996 Act.[7] Unsurprisingly, these commenters then proceed to mischaracterize what the CAA actually says, asserting, for example, that Congress "statutorily codified the 39 percent cap,"[8] or it "set" the "cap at 39 percent in the statute."[9] That, however, is not what Congress did in the CAA.

As NAB, other commenters and the FCC have explained,[10] Congress never "enshrined" the 39 percent cap (or the previous 35 percent cap) "in the statute itself."[11] Rather, in Section 202(c)(1)(B) of the 1996 Act, Congress directed the FCC to "modify its *rules* for multiple ownership" by "increasing the national audience reach limitation for television stations to 35 percent."[12] Then, in 2003, the FCC approved an order modifying

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that the Commission does not have authority to eliminate the discount, which was part of the cap").

[7] *See* Free Press Comments at 5; Revised Comments of State Attorneys General at 4-5; DISH Comments at 12-13; Newsmax Comments at 3; Comments of Public Interest Commenters at 1-2.

[8] Newsmax Comments at 3.

[9] Free Press Comments at 5; *accord* DISH Comments at 13.

[10] Report and Order, 31 FCC Rcd 10213, 10222 (2016) (2016 UHF Discount Order) (the CAA "did not impose a statutory national audience reach cap"); *see* NAB Comments at 6-8; Comments of Nexstar Broadcasting, Inc., MB Docket No. 17-318, at 6-12 (Mar. 19, 2018); Comments of Sinclair Broadcast Group, Inc., MB Docket No. 17-318, at 3-6 (Mar. 19, 2018).

[11] *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002).

[12] 1996 Act, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111 (emphasis added).

several of its broadcast ownership rules, including raising the national cap to 45 percent.[13] Interested parties at the time – even those that opposed an increase of the cap on policy grounds – did not challenge the FCC's authority to raise the cap to 45 percent and, more importantly, neither did Congress. In Section 629(1) of the 2004 CAA, Congress specifically referred back to Section 202(c)(1)(B) of the 1996 Act and directed the FCC to modify its national TV rule by "inserting '39 percent,'" thereby only indicating disagreement with the *number* the FCC had selected.[14] If Congress had intended to prohibit the FCC from ever altering the national cap in the future, it could have easily adopted a statutory prohibition, as the Commission previously observed.[15] Instead, in Section 629(1) Congress changed only the number and left unchanged the language of the 1996 Act – language that Congress knew had not been seen as limiting the FCC's authority to modify the national TV ownership rule.[16] For these reasons, commenters simply asserting that Congress "set the Cap at 39%" – but failing to even mention, let alone seriously address, the actual language of Section 629(1) of the CAA or the relevant language of the 1996 Act – do not make their case that the FCC lacks authority to modify or eliminate the national audience reach cap.[17]

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[13] Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) (2003 Ownership Order).

[14] CAA, Pub. L. No 108-199, § 629(1), 118 Stat. 3, 99.

[15] 2016 UHF Discount Order, 31 FCC Rcd at 10224 (Congress could have "foreclosed" the FCC "from ever revising the national audience reach cap or the UHF discount" by adopting "a statutory restriction"); *accord* NAB Comments at 7; Consumers Union Comments at 6.

[16] *See, e.g., Biennial Review Report*, 15 FCC Rcd 11058, 11072-73 (2000) (retaining the 35 percent national cap, and stating that recent market developments "need[] further observation prior to any change in the cap" in the future); 2003 Ownership Order, 18 FCC Rcd at 13815 (raising cap to 45 percent).

[17] Revised Comments of State Attorneys General at 5. Citing a few floor statements by individual members of Congress does not make the argument of the State Attorneys General any more convincing. *Id*. at 6. In surveying legislative history, the Supreme Court has expressly "eschewed reliance" on comments of an individual member and statements from floor debates. *Garcia v. U.S*. 469 U.S. 70, 76 (1984). In addition, the cases cited by the

Nor does the language of Section 629(3) strip the FCC of its authority to review its national audience reach cap, as several commenters erroneously contend.[18] As NAB discussed in its comments and as the FCC previously determined, this section of the CAA merely relieves the FCC of its duty under Section 202(h) of the 1996 Act to review the national TV ownership cap every four years.[19] Specifically, the language of Section 629(3) does not prohibit the FCC from reviewing the cap, but only provides that Section 202(h)'s affirmative obligation to review all the broadcast ownership rules periodically "does not apply" to the national audience reach cap.[20]

The absence of a prohibition on the Commission is highly significant, given that the Communications Act of 1934 (Act) includes numerous provisions that expressly prohibit the FCC from taking specified actions.[21] Congress clearly knows how to prohibit the FCC from taking a particular action; it chose not to do so in Section 629(3), and this exclusion of

State Attorneys General (comments at 5, n.13) are inapposite, as the factual circumstances and statutes involved differ notably from the CAA and the 1996 Act, and the commenters overstate their limited holdings.

[18] *See* Comments of Public Interest Commenters at 2; DISH Comments at 13; Free Press Comments at 5; Newsmax Comments at 3.

[19] 2016 UHF Discount Order, 31 FCC Rcd at 10222-23 (CAA only removed the requirement to review the national cap from the quadrennial review mandate, and the FCC retains its authority under the Communications Act to "revisit its own rules and revise or eliminate them" when appropriate); NAB Comments at 8-9.

[20] CAA, Pub. L. No. 108-199, § 629(3), 118 Stat. 3, 100.

[21] Nexstar cites four such provisions in the Act (*see* Comments at 10, n.34), and there are additional ones. *See also, e.g.*, 47 U.S.C. §§ 543(a)(1) ("No Federal agency, State, or franchising authority may regulate the rates" of certain cable systems owned by local authorities); 543(e)(1) ("no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts"); 544a(b)(2) ("the Commission shall not limit the use of scrambling or encryption technology" where its use would not interfere with the functions of subscribers' TV receivers or VCRs).

prohibitory language should be regarded as intentional and purposeful.[22] Contrary to those commenters claiming that the *non*-prohibitory language of Section 629(3) should be read as prohibiting FCC action,[23] the Commission must respect Congress' specific choice of language and not infer a prohibition on its authority to review and update the national TV ownership rule.[24] Indeed, the FCC has a clear obligation under administrative law to reexamine its rules as circumstances change[25] -- and NAB has shown beyond doubt that broadcasters' circumstances in the video marketplace have significantly changed.[26]

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[22] *See, e.g., Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 452-53 (2002) ("it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion" of language in different sections of the same statute); *accord* Nexstar Comments at 10 & n.35. *See also Breuer v. Jim's Concrete of Brevard, Inc*. 538 U.S. 691, 696 (2003) (in finding that a particular statutory provision did not prevent removal of an action from state to federal court, the Court relied on "examples of indisputable prohibitions on removal in a number of other statutes").

[23] *See, e.g.,* Free Press Comments at 5 (Congress in § 629(3) "prohibited further consideration of the cap" by the FCC).

[24] In a variety of contexts, courts have been reluctant to infer a prohibition in the absence of specific statutory language. *See, e.g.*, *Breuer*, 538 U.S. at 694 (declining to find that a statutory provision prevented the removal of an action from state to federal court where "[n]othing on the face" of the statute "look[ed] like an express prohibition of removal"); *Freeman v. Seligson*, 405 F.2d 1326, 1348 (D.C. Cir. 1968) (declining to imply a prohibition preventing the disclosure of certain information in judicial proceedings "[i]n the absence of a specific prohibition against disclosure" in the statutory provision at issue); *Christie v. Marston*, 551 F.2d 1080, 1084 n.8 (7th Cir. 1977) (questioning the government's position in age discrimination case because it would "require reading into the statute" a prohibition "which is not present on its face"); *Brumley v. U.S. Dept. of Labor*, 827 F. Supp. 1409, 1414 (E.D. Ark. 1993) (stating that "[t]here is no explicit language" in the statute at issue prohibiting the Dept. of Labor from requiring certain persons to report their earnings and therefore declining to "infer the prohibition").

[25] *See, e.g., Cincinnati Bell Tel Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992); *Geller v. FCC*, 610 F.2d 973, 979-80 (D.C. Cir. 1979).

[26] Free Press (*see* comments at 5) also very briefly asserts that § 629(2) of the CAA, excluding the cap from the FCC's forbearance authority, shows that Congress intended to remove the cap from FCC review. Section 629(2) states that the FCC may not apply its forbearance authority under § 10 of the Act, 47 U.S.C. § 160, to any entity exceeding the 39 percent cap in Section 202(c)(1)(B) of the 1996 Act. The FCC has already rejected the argument Free Press makes here. While noting § 629(2) is unclear because forbearance authority applies to regulation of telecommunications carriers and not to the regulation of

B. The FCC Has Authority to Alter its Method of Calculating Compliance with the National Cap

NAB agrees with the Commission that it has statutory authority to revise or eliminate the UHF discount as part of its authority to modify the national audience reach cap.[27] Commenters' argument that under the CAA, the FCC may only repeal the UHF discount, but cannot modify or eliminate the national cap, is wholly outcome determinative.[28] To be clear, these commenters are effectively contending that the FCC lacks statutory authority to modify the national audience reach cap by making it *less* restrictive, but nonetheless possesses the authority to modify the cap by making it *more* restrictive. This statutory reading should be dismissed out of hand, as it reflects only these parties' longstanding desire to increase restrictions on TV broadcasters and not the actual language of the CAA and the 1996 Act, as explained in detail above.

Interestingly, in making their statutory argument, these parties generally contend that, although Congress explicitly established a 39 percent limit in the CAA, it did not "expressly reference the UHF discount in any way," thereby leaving the FCC free to repeal

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broadcasters under Title III of the Act, the FCC found the provision to be "most reasonably interpreted" as a directive that it "not decline to enforce against any person or entity the stricter [39 percent] national cap" that Congress directed the FCC to adopt by modifying its rules. 2016 UHF Discount Order, 31 FCC Rcd at 10222-23 n.77. NAB agrees that this provision does not prevent the FCC "from reexamining and revising the national audience reach cap or the UHF discount." *Id*. Significantly, § 629(2) refers specifically to the 39 percent cap in Section 202(c)(1)(B) of the 1996 Act, which, as discussed above, only directs the FCC to modify its national TV rule and does not prohibit the FCC from "changing its rules at a later date." *Id*., at 10223 n.77. Free Press does not acknowledge the actual language of § 629(2), with its references to Section 202(c)(1)(B). Nor does it address the questions raised by the inapplicability of forbearance authority to broadcasters in the first instance.

[27] 2016 UHF Discount Order, 31 FCC Rcd at 10222 (finding that the FCC "has the authority to modify the national audience reach cap, *including* the authority to revise or eliminate the UHF discount") (emphasis added).

[28] *See* Free Press Comments at 5-7, 17-21; DISH Comments at 12-15; Comments of Public Interest Commenters at 1-3; Newsmax Comments at 3-4; Revised Comments of State Attorneys General at 4-9.

the discount.[29] NAB observes that this argument about the FCC's authority to repeal the UHF discount also supports the existence of FCC authority to make other changes to its calculation methodology. After all, while the CAA did not expressly refer to the UHF discount, neither did it explicitly refer to the FCC's calculation methodology as a whole or to its definition of national audience reach.[30] Thus, under the logic of these parties' own argument, the Commission – while repealing the UHF discount and leaving the 39 percent limit intact – could, for example, adopt a VHF discount;[31] it could replace presumed audience reach with a different metric for determining compliance with the cap, such as "actual viewership, market share, or amount of advertising revenue";[32] or it could (and should) adopt NAB's proposal of accounting for all stations at 50 percent of their theoretical reach, due to the highly competitive nature of today's video marketplace.[33]

Perhaps anticipating this eventuality, certain commenters seem to suggest that the only change the FCC could make to its calculation methodology would be repealing the UHF discount, again showing the entirely outcome determinative nature of their arguments.[34]

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[29] Free Press Comments at 18, 22; *accord* Comments of Public Interest Commenters at 1-2 & n.6; DISH Comments at 14; Revised Comments of State Attorneys General at 5, 7.

[30] *See* 2016 UHF Discount Order, 31 FCC Rcd at 10223 ("the CAA does not include any language to indicate that Congress intended to preclude the Commission from reexamining the 'national audience reach' at a later time").

[31] *See id*. at 10238 (declining to adopt a VHF discount "at this time," but not due to a lack of authority to do so); Notice at ¶ 21 (seeking comment on the FCC's previous conclusions about adopting a VHF discount).

[32] Notice at ¶ 18.

[33] *See id*. at ¶ 21 (asking about "station or market characteristics that would warrant discounting or weighting a station's audience reach when determining compliance with a national cap").

[34] *See, e.g.,* Newsmax Comments at 4-5 (decrying the fact that if the national TV ownership limit and the UHF discount were regarded as linked, then the FCC could "completely undermine[]" the 39 percent cap (allegedly) "codified in the CAA by raising the UHF Discount from 50 percent to 60 or 70 percent," and stating that the "only question the FCC needs to address" is whether UHF stations still require a discount); Free Press Comments at 21-22

The relevant terms of the CAA cannot – even by the most extreme mental jujitsu – be twisted into supporting an argument that the FCC (1) lacks authority to modify the 39 percent audience reach cap and (2) possesses the authority to tighten the cap by eliminating the UHF discount, but (3) cannot make other changes to its methodology for calculating compliance with the cap, especially if doing so would allow greater common ownership of TV stations.

Commenters additionally try to justify their "split the statutory baby" argument by pretending that the national TV cap and the UHF discount are "two separate rules with two entirely different purposes and two entirely different sources."[35] That is utter nonsense. The UHF discount exists only as part of the calculation methodology used to determine compliance with the national TV rule. It is not a stand-alone rule, and there would be no reason to define a methodology discounting the audience reach of UHF stations in the absence of a rule limiting the audience reach of TV station owners.[36] Clearly the discount and the cap are an interrelated whole, as "[a]ny adjustment to the UHF discount affects compliance with the national audience reach cap."[37]

(arguing that "[e]liminating the UHF discount in 2016 returned to the [39 percent] status quo Congress intended to preserve" in 2004 and that the discount's reinstatement "fail[ed] to preserve the statutory national audience limit"; also accusing the FCC in the Notice of "cast[ing] aimlessly about" for other non-technical justifications for discounting the audience reach of UHF stations, contrary to Congress' establishment of a 39 percent cap).

[35] Free Press Comments at 24.

[36] *See* NAB *Ex Parte* Communication, MB Docket No. 13-236, at 1-2 (June 23, 2016); *see also, e.g.*, Reply Comments of Nexstar Broad., Inc. in Support of Pet. for Reconsideration, MB Docket No. 13-236 at 7 (Jan. 23, 2017) (explaining that the national cap and UHF discount are intertwined, as one establishes a limit while the other defines how to calculate that limit).

[37] 2017 UHF Recon Order, 32 FCC Rcd at 3395.

The FCC, moreover, adopted the discount in the same order that it first approved a national TV audience reach cap. This order shows their interrelatedness, stating that the 25 percent "audience reach limit adopted herein is the [] appropriate vehicle for expressing our continued concern" with UHF television.[38] The discount is included within subsection (e) of 47 C.F.R. § 73.3555, which also includes the 39 percent audience reach cap and which is entitled "National television multiple ownership rule." Unsurprisingly, the Commission – in both its 2016 order eliminating the UHF discount and in its 2017 reconsideration order reinstating the UHF discount – rejected the idea that the discount and the national cap are separate rules and that the FCC would have authority to review the former but not the latter.[39]

While the FCC's decisions alone should lay to rest the specious claim that the audience reach cap and its calculation methodology, including the UHF discount, are "separate rules" from "different sources,"[40] this argument also is contrary to a 2016 decision of the Third Circuit Court of Appeals. In that decision, the Court rejected the FCC's attempt to alter its ownership attribution rules – which "modifie[d] the Commission's ownership rules by making them more stringent" -- without considering whether the local ownership rules themselves were "sound."[41] Just as the Court found that "[a]ttribution rules

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[38] Memorandum Opinion and Order, 100 FCC 2d 74, 93 (1985).

[39] 2016 UHF Discount Order, 31 FCC Rcd at 10222 (concluding that "no statute bars the Commission from revisiting the cap or the UHF discount *contained therein*") (emphasis added); *id.* at 10223 (referring to "the UHF discount *contained in the rule*") (emphasis added); *id*. at 10222-23 (stating that FCC "retains authority under the Communications Act to review *any aspect* of the national audience reach cap") (emphasis added); 2017 UHF Recon Order, 32 FCC Rcd at 3398 n.60 (because the UHF discount is "part of the cap," if the FCC lacks "authority to modify the cap, then it follows that the Commission does not have authority to eliminate the discount").

[40] Free Press Comments at 24.

[41] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 58 (3d Cir. 2016).

do not exist separately from the ownership rules to which they relate," and that "[i]f there were no ownership caps, there would be no need to have attribution rules,"[42] there would be no need to have the UHF discount, or any calculation methodology at all, if it were not for the national TV ownership limit. Thus, parties' attempts here to split the UHF discount from the "entwined" national TV ownership cap are in vain.[43] The FCC should reject forthwith the contention that it has authority to repeal the UHF discount – which would "modif[y]" the national TV ownership rule "by making [it] more stringent"[44] – but at the same time lacks authority to modify or eliminate the national audience reach cap.

III. PARTIES CALLING FOR MORE RESTRICTIONS ON OWNERSHIP OF TV STATIONS IGNORE THE REALITIES OF TODAY'S ONLINE, DIGITAL VIDEO MARKETPLACE

A. Based on the Record, the FCC Cannot Rationally Reduce the Current Level of TV Station Ownership Allowed Nationwide

As discussed above, several commenters urge the FCC to make the national cap more restrictive by retaining the 39 percent reach limit and eliminating the UHF discount. But while calling for a reduction in the current level of TV station ownership allowed nationwide, they turn a blind eye to the competitive realities of today's video marketplace. Remarkably, the comments of many of these parties include *no* references to online video or the internet or, at best, make only passing references to the internet,[45] even though it is, according to the FCC, "America's most important platform for economic growth, innovation,

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[42] *Id*. at 59.

[43] *Id*. (stating that attribution is "entwined with ownership caps" and that the "purpose" of the attribution rules "is to delimit the scope" of the ownership caps).

[44] *Id*. at 58.

[45] *See* Comments of Consumers Union; Comments of DISH; Revised Comments of the State Attorneys General; Comments of American Cable Ass'n (ACA), MB Docket No. 17-318 (Mar. 19, 2018); Comments of Public Interest Commenters; Comments of The Leadership Conference on Civil and Human Rights, MB Docket No. 17-318 (Mar. 19, 2018); Comments of Herndon-Reston Indivisible, MB Docket No. 17-318 (Mar. 19, 2018).

competition [and] free expression."[46] Just as remarkably, another commenter claims that "changes in the television landscape should have no impact on how the Commission should view its ownership rules"[47] – a position contrary to Section 202(h) of the 1996 Act, basic tenets of administrative law,[48] relevant court precedent[49] and common sense.

The few commenters deigning to mention the internet and online video, however, do not engage in any serious analysis of the current video marketplace. Free Press, for example, mainly contents itself with multiple rhetorical references to "broadcast conglomerates" and "massive consolidation" in the broadcast industry.[50] It ignores consolidation in the pay-TV and broadband marketplaces; the fierce competition TV broadcasters face from much larger pay-TV and "monster" online video services like Netflix and Amazon for both viewers and advertisers;[51] and the benefits to consumers from an unprecedented abundance of viewing options – issues that NAB addressed in detail.[52]

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[46] Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5563 (2014).

[47] Newsmax Comments at 5.

[48] *See, e.g., Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (stating that "changes in factual and legal circumstances may impose upon [an] agency an obligation to reconsider a settled policy").

[49] *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).

[50] Free Press Comments at 8-9, 11-13.

[51] *Kagan Industry Report: The State of Online Video Delivery*, S&P Global Market Intelligence, at 1 (Oct. 2017) (predicting that subscription online video homes will surpass the number of traditional multichannel video subscriber homes in 2020).

[52] NAB Comments at 11-19, 27-29, and Exhibits A-E; *see also* Comments of Nexstar Broad., Inc., MB Docket No. 17-318, at 15-24 (Mar. 19, 2018). NAB also explains herein that some commenters significantly exaggerate the level of consolidation in the broadcast TV industry. *See infra* page 26 & note 90.

Other commenters appear to be living in an alternate video universe. The Writers Guild, for example, complains about the decline in diversity of content, independent programming, creativity and innovation due to consolidation and the repeal of the FCC's financial interest and syndication rules in 1993.[53] In reality, diverse and highly creative video content has exploded in the past quarter century, with hundreds more scripted original series available to viewers today from multiple sources, including broadcast, basic and premium cable and online services, many of which did not even exist in 1993.[54]

Similarly, only in an alternate video universe – or a past life – could broadcast television be regarded as "dominant."[55] In 2017, broadcast TV shows accounted for only 31.4 percent of the total scripted original series, and broadcast TV's total share of prime time viewing (counting broadcast and cable/DBS) among the audience most coveted by advertisers (those ages 18-49) was 31 percent.[56] Even more telling, during any given minute of prime time in 2017, an estimated 10.2 million people ages 18-49 were viewing broadcast TV – and these 10.2 million people represent just *7.9 percent* of the estimated total 128.9 million people ages 18-49 in U.S. TV households. Similarly, the average 32.6 million people ages two and older who viewed broadcast TV during any given minute of prime time in 2017

[53] Comments of Writers Guild of America West, Inc., MB Docket No. 17-318, at 4-5 (Mar. 19, 2018).

[54] From 2002-2017, the number of original scripted series grew from 182 to 487, with the greatest growth coming from cable and online services. NAB Comments at 17-18. Many of these cable and online series have been both popular and critically lauded. For example, in 2017, "The Handmaid's Tale" (Hulu) and "Veep" (HBO) won the Emmy Awards for best drama and comedy series, respectively, and cable and streaming series dominated the acting awards as well.

[55] Writers Guild Comments at 5.

[56] NAB Comments at 17, 28. While, as the Writers Guild observes, most top-rated prime time programs are still on broadcast TV, the ratings of those programs have fallen significantly over time, as audiences have fragmented due to competing viewing options. *Id*. at 27-28.

represent only *10.7 percent* of the estimated total 304.5 million people ages two and older in U.S. TV households.[57] These percentages revealing the limited effective reach of TV stations demonstrate that broadcasters' competitive position in today's digital video marketplace can in no way be termed dominant.[58]

Not only do these commenters ignore the significant role of the internet and online video services in increasing competition and content diversity in the video marketplace, they downplay the transformative role of the internet in the marketplace of ideas. They do so in a vain attempt to argue that TV stations are the only significant providers of news left in local markets and that the public therefore would be harmed by additional consolidation, which

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[57] *Id.* at 28-29. This evidence of the actual reach of TV broadcasters refutes the claim that eliminating the UHF discount and accounting for all TV stations at 100 percent of their theoretical reach would "accurately reflect the true reach of each station." Revised Comments of State Attorneys General at 14. These commenters erroneously assume that the FCC's audience reach methodology is sound and tethered to reality in the first place, when, in fact, it is merely an artificial accounting metric. NAB Comments at 25.

[58] Data cited by the Writers Guild do not support its claims of broadcast dominance. For example, the fact that consumers spend much more time watching "live and time-shifted television" than watching video on computers or smartphones says little or nothing about the time viewers spend watching *broadcast* TV or the time they spend watching online video services. Writers Guild Comments at 6. Nielsen's total audience report cited by the Writers Guild reports the time spent viewing broadcast and cable/DBS, not just broadcast alone, and, in any event, the time consumers spend watching traditional TV (broadcast and cable/DBS, live + time-shifted) has fallen significantly over the past several years. NAB Comments at 16 & Att. C; J.C. Lupis, *The State of Traditional TV: Updated With Q2 2017 Data*, marketingcharts.com (Dec. 13, 2017) (from 2012-2017, the weekly time spent viewing traditional TV declined 45.5 percent among teens ages 12-17; 43.6 percent among those ages 18-24; 32.2 percent among those ages 25-34; 15.8 percent among those ages 35-49; and 1.1 percent among those ages 50-64). Given that nearly 70 percent of U.S. households had at least one TV set connected to the internet in 2017, many viewers clearly watch online video services via TV sets, rather than computers or smartphones. NAB Comments at 15. And citing Nielsen's figure that the number of broadcast-only homes rose to 15.8 million in 2017 scarcely shows dominance, *see* Writers Guild Comments at 6, given that Nielsen currently estimates there are 119.6 million U.S. TV households.

would reduce the number of separate providers of local news.[59] This argument should be dismissed for any number of reasons, some of which are summarized below:

- First, the ownership rule at issue here is the national TV cap, not the local TV rule. Allowing a broadcaster to own stations in more markets across the country does not reduce the number of separately-owned stations within local TV markets, which are the relevant markets for discussing sources of local news and information available to consumers.[60]

- Second, online sources of news and information have exploded, including "digital native" sources and locally-oriented ones.[61] Online news use is rapidly "closing in on TV" as the most often used source of news; 67 percent of Americans reported in 2017 that they get at least some of their news on social media; and 93 percent of adults now get at least some news online.[62]

- Third, while NAB agrees with commenters that local TV news is a trusted news source relied upon by many viewers across the country, that reliance has notably declined, given all the other news sources, especially digital ones, competing for consumers' time and attention. The Pew Research Center annual reports have documented this fragmentation in the audience for news.[63]

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[59] *See, e.g.*, Writers Guild Comments at 7-8; Comments of Public Interest Commenters at 3-5; Free Press Comments at 10-11.

[60] The FCC concluded in 1984 that the local market was the relevant one for evaluating viewpoint diversity and that the national TV rule was not needed to promote viewpoint diversity. The FCC reaffirmed this conclusion in 2003. See 2003 Ownership Order, 18 FCC Rcd at 13826. And no one can possibly dispute the vast array of diverse viewpoints available to consumers on a national level today.

[61] *See, e.g., Digital News Fact Sheet*, State of the News Media, Pew Research Center (Aug. 7, 2017) (discussing the growing audiences of "digital native" news outlets); Mark Jurkowitz, *Small digital news sites: young, lean and local*, Pew Research Center (Apr. 2014) (survey of 438 smaller digital native news sites showed that more than half focus primarily on local news); Pew Research Center, *Local News in a Digital Age* (Mar. 5, 2015) (report examining local media usage found that Denver, CO had 143 separate news sources, 25 of which were "digital-only outlets" with no connection to legacy print or TV media organizations). Commenters arguing that online news outlets are not locally-focused, do not engage in original reporting and/or are not independent from newspapers or TV stations frequently cite outdated sources for their assertions. *See, e.g.*, Comments of Public Interest Commenters at 4 (citing a 2007 source); Free Press Comments at 11 (citing sources from 2010 and 2011).

[62] *See* NAB Comments, MB Docket No. 17-214, at 11-12 (Oct. 10, 2017) and sources cited therein.

[63] In 2016, viewership for local affiliate news stations (ABC, CBS, Fox and NBC) declined in key time slots (morning, early evening and late night). Since 2007, the average audience for late night newscasts has declined 31 percent, while morning audience declined 12 percent and early evening audience fell 19 percent. Local TV noon and 7:00 p.m. news viewership

- Fourth, the commenters here ignore the profound impact that the internet has had on members of the public and the media – an impact they have consistently extolled in contexts other than broadcast ownership. For example, Common Cause, one of the Public Interest Commenters, earlier commented to the Commission:

> With the decline of newspaper reading and local TV news viewing, voters are finding a new forum online, where citizens discuss the issues and advocates organize their constituents. Candidates for election are increasingly using the Internet to reach out, inform, and spread their campaign messages, and voters are utilizing diverse forums to communicate their messages to public officials. . . . With a few keystrokes, engaged citizens can express their political voices by generating website content, writing on a blog, or simply posting on a social networking site. . . . Voters use the Internet not only to discuss and share their views, but to seek out information and the latest news regarding our government and its many players. Both high profile reporters and newer voices are increasingly finding homes on digital media news sources. With traditional outlets ever more constrained, these online reporters are both filling in gaps in local and diverse niche topics, and are cultivating new forms of storytelling via video, crowdsourcing, and new visualizations, styles, and means to connect with viewers.[64]

Commenters previously espousing this view of the internet cannot now pretend that its role in expanding viewpoint diversity is minimal.

In sum, commenters clearly have failed to provide the requisite reasoned analysis supported by documentary and economic evidence needed to justify a more restrictive national TV cap in today's – not yesteryear's – video marketplace.[65] Indeed, many fail to directly acknowledge that they are proposing a more stringent ownership limit, as they try to

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also declined. *Local TV News Fact Sheet*, State of the News Media, Pew Research Center (July 13, 2017).

[64] Comments of Common Cause, GN Docket No. 14-28, at 4-5 (July 14, 2014).

[65] *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (stating that, while agencies may "change their existing policies as long as they provide a reasoned explanation for the change," the agency here fell short of its "duty to explain why it deemed it necessary to overrule its previous position," especially given "decades of industry reliance" on the prior policy); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (finding wireless ownership restrictions to be arbitrary and capricious because FCC had offered only "broadly stated fears" about market power and concentration to justify them, rather than any factually supported economic rationale).

justify eliminating the UHF discount as a mere unrelated technical correction.[66] This position is untenable, as the FCC has already correctly determined that repealing "the discount has the effect of substantially tightening the cap in some cases."[67] In light of TV broadcasters' limited effective reach in the extremely competitive video marketplace, as shown by the record in this proceeding, it would be arbitrary and capricious for the FCC to cut back on the current level of TV station ownership permitted nationwide, whether by lowering the 39 percent cap or by altering the method of calculating compliance with the cap.[68]

B. Parties Calling for Greater Restrictions on Broadcasters Alone Display Confusion and Illogic and, Ultimately, Support Policies that Will Not Achieve their Stated Goals

Beyond failing to acknowledge competitive realities in the 21st century video marketplace, several commenters make inconsistent and illogical arguments that show a disconnect between their expressed goals and their support for stricter ownership regulation. The Writers Guild, for example, recognizes that pay-TV providers have consolidated horizontally and vertically; that broadcast TV station groups have grown larger in response as they try to enhance their bargaining position with "ever-more-powerful MVPDs"; and that "[c]onsolidation is occurring at every level, in every configuration and

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[66] *See, e.g.*, Newsmax Comments at 4-5; Free Press Comments at 21-24; Comments of Public Interest Commenters at 2-3; Leadership Conference Comments at 1-2; DISH Comments at 12-13.

[67] 2017 UHF Recon Order, 32 FCC Rcd at 3395. Because eliminating the discount makes the national TV ownership rule more stringent, it directly affects TV licensees' compliance with the rule, their ability to acquire or sell stations and their ability to compete with much larger pay-TV and online video providers. NAB Comments at 23-24.

[68] *See* NAB Comments at 22-25 and cases cited therein; *see also, e.g.,* Nexstar Comments at 12-24 (arguing that current video marketplace conditions justify repeal of the national cap entirely); Comments of Nat'l Fed. of Independent Business, MB Docket No. 17-318, at 3 (Feb. 9, 2018) (stating "[t]here is no need for the national cap," given the "multiplicity" of communications technologies today).

market within media."[69] Yet, the Writers Guild "solution" is to call for tightening restrictions on TV broadcasters, without explaining how increased disparate regulation in today's market will promote the economic viability and continued provision of stations' "key" programming, including "singular" local news.[70] Similarly, Free Press acknowledges that online news operations "may compete with broadcast newsrooms for eyeballs and ad dollars,"[71] but it refuses to consider that TV stations need to achieve economies of scale and scope to compete with other outlets for the audiences and ad revenues that support the local broadcast news operations it claims to value. And the Public Interest Commenters display hopeless confusion. On the one hand, they seem to recognize the necessity of TV broadcasters having sufficient resources to serve the public with quality programming, including local news.[72] But then they oppose all national and local consolidation because new entrants cannot compete with large TV station groups that "have the resources to acquire higher-quality programming" and thus can "attract higher-dollar advertisers."[73]

Common ownership allowing TV station groups to provide "higher-quality programming" to viewers, and to earn the "higher-dollar" ad revenues needed to acquire

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[69] Writers Guild Comments at 4-5.

[70] *Id.* at 5-7.

[71] Free Press Comments at 11.

[72] Comments of Public Interest Commenters at 3 ("It takes resources including reporters, camera crews, and editors, along with studios and equipment, to produce local news."). We agree. NAB's annual TV financial reports have shown that news expenses consistently represent between 26-28 percent of ABC/CBS/NBC/Fox stations' total expenses. *See* NAB *Ex Parte* Submission, MB Docket Nos. 09-182, *et al*., at Attachment A (Mar. 21, 2014).

[73] Comments of Public Interest Commenters at 7. Similar illogic runs throughout these comments. The Public Interest Commenters observe, for example, that the newspaper industry's financial problems led to reduced output of local news and some papers going out of business, but in the very next sentence complain that the repeal of the newspaper/broadcast cross-ownership ban – which prevented broadcaster investment in these struggling newspapers – will "reduce the diversity of local news sources." *Id*. at 4-5.

and produce additional quality programming, including local news, cannot justify calls for stricter regulation. To the contrary, it shows the importance of allowing broadcasters to achieve economies of scale and scope through efficient ownership combinations and the benefits to the public of permitting those combinations. Economic studies have found that TV broadcasting generally, and local news production specifically, are subject to strong economies of scale and scope, which are, by definition, "associated with falling unit costs of production" and "hence are *prima facie* welfare enhancing."[74] Given the importance of scale and scope economies to TV news investment and production, it is unsurprising that numerous empirical studies have found a significant positive relationship between TV station revenues and local news production.[75]

Commenters assuming all consolidation is bad,[76] or suggesting that marketplace considerations are simply irrelevant because broadcasters must serve the public interest,[77]

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[74] J.A. Eisenach and K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 1-2 (2011), Attachment A to Reply Decl. of J.A. Eisenach and K.W. Caves, NAB Reply Comments at Appendix A, MB Docket No. 10-71 (June 27, 2011) (Economies of Scale Report). *See also* Decl. of Mark Israel and Allan Shampine, Compass Lexecon, NAB Comments, MB Docket No. 10-71, at Appendix B, ¶¶ 49-51 (June 26, 2014) (finding that scale and scope economies "lead[] to increased investment in news programming").

[75] Economies of Scale Report at 45-46 & Table 8 (citing multiple studies). *See also Ex Parte* Submission of NAB, MB Docket Nos. 09-182, *et al*., at 7-8 (Mar. 21, 2014) (citing additional studies showing importance of stations' financial standing to provision of news and public affairs programming).

[76] *See, e.g.*, Comments of Public Interest Commenters at 5, 7; Free Press Comments at 11-13. Among other complaints, the Public Interest Commenters (*see* comments at 7) assume that common ownership inevitably leads to cuts in news staff. This assumption is not supported by the evidence, as RTDNA research estimated total TV newsroom employment in 2016 at 27,600, which tied 2012 for the third-highest total staffing ever; peak employment in TV newsrooms "came in the dot-com bubble of 2001." Bob Papper, *RTDNA Research: Newsroom Staffing*, rtdna.org (June 19, 2017).

[77] *See* Newsmax Comments at 5-6; Writers Guild Comments at 5; Consumers Union Comments at 6-7.

both disregard the economic realities of TV broadcasting and local news operations. The fact that broadcasters are obligated to – and do – serve their communities of license does not imply that any and all ownership restrictions should be imposed on them or that the FCC cannot legitimately take competitive and economic issues into account. Indeed, the Commission has said it best: A broadcaster's "ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[78] Specific examples abound of the public benefits derived from TV broadcasters taking advantage of economies of scale and scope.[79]

Finally, some commenters supporting a stricter national cap argue that consolidation harms ownership diversity.[80] But these commenters do not show that more stringent ownership rules ever have in the past, or likely will in the future, effectively promote

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[78] Report and Order, 7 FCC Rcd 2755, 2760 (1992).

[79] For example, because Nexstar Broadcasting and Gray Television have stations in multiple markets, both are able to maintain their own news bureaus in Washington, DC. These bureaus provide custom coverage of events and issues in Washington (including coverage of Congress and the Administration) that directly impact the local markets where Nexstar and Gray have stations. *Gray Announces Opening of Washington, D.C. News Bureau to Deliver Hyper-Local Coverage and Analysis of National Issues*, prenewswire.com (Feb. 2, 2015); Nexstar Comments at 24 n.89. Nexstar also has established 19 state-wide bureaus that cover state political issues and matters of regional interest for Nexstar's stations in the applicable states. Nexstar Comments at 24 & n.89 (stating that creation of these state bureaus would not have been possible without the economic efficiencies flowing from greater scale). Other station groups utilize their joint resources to provide valuable programming and public service initiatives in their markets. For instance, in January 2017 Hearst began its "State of Addiction" initiative; as of September 2017, their stations had produced and aired over 1,600 related stories about the opioid crisis, and that month Hearst's stations aired a prime-time special about the crisis, which focused on local content and material supplied by various stations in their group. *See* NAB Comments, MB Docket No. 17-214, at 11 (Oct. 10, 2017). In February of this year, all Raycom Media stations aired a documentary called "Trail of Hope – The Journey to Equality," which followed the path of the civil rights movement through churches, courthouses, jails and other historic sites in the South. This program was created with help from many Raycom stations. *See* http://www.broadcastpublicservice.org/story.asp?id=3730

[80] *See, e.g.,* Free Press Comments at 14-15; Leadership Conference Comments at 3.

ownership by women and people of color. After all, female and minority ownership of broadcast stations was extremely low decades ago when the FCC set the national TV cap at seven stations, prohibited the ownership of more than one TV station in local markets, and imposed strict national and local limits on radio ownership and on local cross-ownership of radio and TV stations. Despite these very stringent limits, the FCC reported in 1978 that minorities "control[led] fewer than *one percent*" of the commercial radio and TV stations in the U.S.[81] – a figure noticeably lower than today.[82] Free Press, moreover, while claiming to care about ownership diversity, not only clings to policies that demonstrably do not advance that goal, but even actively opposes measures, such as the FCC's incubator program, that could well succeed in promoting new entry.[83] The Commission should disregard the arguments of Free Press and others here, and focus on establishing an effective incentive-based program to advance ownership diversity – a goal that NAB, at least, has supported for decades with practical measures and programs.[84]

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

[82] In late 2015, ethnic and racial minorities owned 7.1 percent of all full-power commercial TV stations, 10.8 percent of commercial AM stations and 6.5 percent of commercial FM stations. *Third Report on Ownership of Commercial Broadcast Stations: FCC Form 323 Ownership Data as of Oct. 1, 2015*, at 6-7, 12-15 (Med. Bur. May 2017). Ethnic and racial minorities owned 15.2 percent and 15.8 percent, respectively, of all Class A TV and LPTV stations in 2015. *Id*. at 9-11.

[83] *See* Letter of Free Press, MB Docket Nos. 17-289, *et al*. (Mar. 9, 2018). And despite its supposed concern about ownership diversity, Free Press cited out-of-date statistics about female and minority ownership in this proceeding. Free Press Comments at 14.

[84] *See* NAB Comments, MB Docket Nos. 17-289, *et al*. (Mar. 9, 2018) (providing recommendations for the elements of an effective incubator program and describing NAB diversity initiatives such as the Broadcast Leadership Training Program). Indeed, in 1978, the FCC adopted a tax certificate program similar to one NAB had previously proposed to the Commission. *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 the FCC's Advisory Committee on

IV. THE FCC SHOULD REJECT THE PAY-TV INDUSTRY'S SELF-SERVING ARGUMENTS SUPPORTING THE DISPARATE REGULATION OF TV BROADCASTERS

Pay-TV industry commenters support retention of the existing or imposition of a stricter national TV ownership rule, due to broadcasters' supposed harmful leverage in retransmission consent negotiations.[85] The FCC should reject these self-serving calls from pay-TV commenters.

A. Pay-TV Providers' Claims About Broadcasters' Leverage in Retransmission Consent Negotiations Ignore Marketplace Conditions

As in previous FCC proceedings, pay-TV industry claims about broadcasters' alleged excessive bargaining power in retransmission consent negotiations ignore the concentrated nature of the MVPD and broadband marketplace and the diffuse nature of the video programming marketplace.[86] While pay-TV providers face increased competition from over-the-top video services and have lost subscribers due to cord cutting, 75 percent of all TV households still subscribe to a traditional MVPD service.[87] Measured by subscribers, the ten largest providers control a whopping 94.4 percent of the nationwide pay-TV market and 92.1 percent of the nationwide broadband market; the top four providers control 79.2 percent of the pay-TV market and 70.5 percent of the broadband market; and the top three control

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Diversity and Digital Empowerment and numerous other parties, including NAB, continue to call for reinstatement of such a program.

[85] See DISH Comments at 2 (calling for maintaining 39 percent cap and repealing UHF discount); Comments of NTCA—The Rural Broadband Ass'n, MB Docket No. 17-318, at 2 (Mar. 19, 2018) (opposing any increase in existing national TV cap); ACA Comments at 2, 10 n.30 (claiming that an increased cap will harm MVPDs and their subscribers, and stating that Congress intended to remove the FCC's discretion to change the cap while maintaining its discretion to eliminate the UHF discount).

[86] See DISH Comments at 4-5 (claiming an "asymmetry of bargaining power" between TV stations and MVPDs greatly favoring broadcasters); ACA Comments at 3-4 (describing the alleged harms that broadcasters with leverage inflict on MVPDs).

[87] *Multichannel Trends*, S&P Global Market Intelligence (Q3 2017 data).

67.1 percent of the pay-TV market and 63.7 percent of the broadband market.[88] Notably, with only one exception, the largest MVPDs are also the largest broadband providers, and thus occupy significant positions in both the traditional multichannel video marketplace and the newer online video marketplace.[89] Both DISH and ACA completely ignore these high concentration levels, and DISH also exaggerates the extent of consolidation in the broadcast TV industry.[90]

Moreover, in stark contrast to the "highly concentrated" downstream programming distribution markets, which have "little scope for competitive entry,"[91] the "upstream

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[88] *Id*. In addition, the top two internet-delivered multichannel pay TV services (Sling TV and DirecTV Now) are owned by two of the largest traditional pay-TV providers (DISH and AT&T/DirecTV).

[89] *Id*. While some broadcast TV station groups have grown larger in recent years, they do not approach the size of the consolidated MVPD and broadband providers. *See* NAB Comments at 12 (showing that on February 28, the market capitalization of AT&T/DirecTV was approximately $226 billion, Comcast's market cap was about $172 billion and Charter's market cap exceeded $95 billion, while the market caps of E.W. Scripps, Gray, Tegna, Nexstar and Sinclair ranged from just over $1 billion to about $3.4 billion). DISH's $20 billion market cap also greatly exceeds these local TV station groups' capitalizations.

[90] For example, as a result of DISH's so-called "big bang of broadcast industry consolidation," each of the four largest TV station groups in 2017 had more stations than the largest group did in 2008. DISH Comments at 5-6. That factoid is underwhelming, given that AT&T/DirecTV today has more subscribers than the *top 25* MVPDs combined in 1985. NAB Comments at 11-12. Also, according to DISH, the 10 largest broadcast TV groups in 2017 owned 613 full-power TV stations, but that is only 34.7 percent of all full-power TV stations in the country. DISH Comments at 6; FCC News Release, *Broadcast Station Totals as of Dec. 31, 2017* (Jan. 5, 2018). According to BIA/Kelsey, there are 424 separate owners of full-power TV stations, 171 separate owners of Class A stations and 572 separate owners of LPTV stations in the U.S. Looking at commercial stations only, there are 244, 170 and 522 separate owners of commercial full-power TV stations, Class A stations and LPTV stations, respectively. BIA/Kelsey, Media Access Pro database, Feb. 2018. The average owner of full-power commercial TV stations has 5.6 stations (1377 total commercial full-power stations divided by 244 separate owners). *Id*.; FCC News Release, *Broadcast Station Totals as of Dec. 31, 2017* (Jan. 5, 2018).

[91] Kevin Caves and Bruce Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at 20, Heading B (Feb. 2016), attached to NAB Written *Ex Parte*, MB Docket Nos. 15-216, 10-71 (Feb. 16, 2016) (Caves and Owen Study). *See also* 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 37

content markets are increasingly fragmented across a large and growing space of viewing options."[92] As documented in this and other proceedings, the exponential growth in the amount, variety and quality of video programming continues unabated, with new records for the number of scripted original series being set every year.[93] Pay-TV commenters in this proceeding predictably ignore these marketplace developments as well.

The fragmentation in the video programming marketplace, combined with concentration in the distribution marketplace, gives consolidated pay-TV/broadband providers (1) "significant bargaining power" over video programmers, including local broadcast stations, whose advertising revenues depend on being available on as many platforms as possible and accessible to as many viewers as possible;[94] and (2) "significant bargaining leverage over edge providers," including online video service providers, because they can "block edge providers from reaching a significant fraction of households."[95] Interestingly, Public Knowledge has described the competitive dynamics between video programmers and distributors more accurately than the pay-TV industry. Public Knowledge has correctly recognized that programmers "prefer to be carried" not just by one pay-TV

(Aug. 29, 2017) (finding that households have "limited choices" for wired broadband providers and for "ones that also operate MVPDs," and that significant barriers will likely prevent entry) (Evans Competition White Paper).

[92] Caves and Owen Study at 13.

[93] NAB Comments at 17-19; *see also* Caves and Owen Study at 13-19. In this fragmented marketplace, claims that broadcast programming is uniquely "must have" are increasingly suspect. With so many more options for pay-TV providers today, any one channel or network is increasingly less vital for an MVPD offering dozens, if not hundreds, of channels.

[94] Evans Competition White Paper at 23-24; *accord* U.S. Dep't of Justice, Competitive Impact Statement at 5, 12-14, *U.S.A. v. Charter Communications, Inc. et al.*, Civil Action No. 1:16-cv-00759 (RCL) (D.D.C. May 10, 2016). *See also* Caves and Owen Study at 19 (given highly concentrated nature of the MVPD marketplace, a station's "failure to secure carriage with even a single MVPD could mean the difference between profit and loss").

[95] Evans Competition White Paper at 5.

provider "but by all MVPDs," including cable companies, DISH, DirecTV and any telecommunication video providers, even when they "overlap" in local markets. "Because programmers do not choose between competing distributors but instead typically do business with many of them at once, large distributors do not compete with one another for access to programming."[96]

Thus, rather than TV stations being able to play multiple distributors against one another, as DISH asserts,[97] in reality TV stations prefer to – indeed must – reach retransmission agreements with all major pay-TV providers to ensure their accessibility to as many viewers as possible.[98] As a 2016 economic study concluded, "MVPD distribution agreement[s]" are "'must have' input[s] from the broadcaster's point of view."[99] Local TV stations therefore do not have undue leverage over MVPDs in retransmission consent negotiations.

B. Pay-TV Providers' Objections to Paying Retransmission Consent Fees Higher than in the Past Do Not Show that Those Fees Are Anticompetitive or that the FCC Should Impose Stricter Ownership Limits on TV Broadcasters

Both DISH and ACA assert, based on an earlier economic analysis of DISH's own confidential data, that all else being equal, the larger the broadcast station group, the higher

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[96] Comments of Public Knowledge, MB Docket No. 16-41, at 17-18 (Mar. 30, 2016).

[97] *See* DISH Comments at 4 (claiming that each network affiliated TV station "has four or five options" for distribution to viewers).

[98] DISH's contentions that broadcasters suffer little or no harm in retransmission disputes also are erroneous. *Id*. Obviously, a station's ratings and ad revenues suffer if its signal is not carried by a pay-TV provider with a substantial percentage of the local MVPD market. *See* Caves and Owen Study at 19. DISH's claim that MVPDs "bleed[] subscribers" to competing distributors during a retransmission dispute is unsupported by empirical evidence and questionable on its face, given the hefty early termination fees that MVPDs typically impose on consumers and the inconvenience of switching pay-TV providers.

[99] Caves and Owen Study at 19.

the retransmission price paid by DISH.[100] Even assuming the accuracy of their assertion and the validity of DISH's analysis (which NAB cannot verify and which has been disputed), their claim says little about whether those retransmission fees are anticompetitive, let alone anticompetitive as a result of broadcaster market power. In fact, the most obvious explanation for the reported difference in the retransmission fees paid to large and small broadcasters rests with *DISH's* market power. It would hardly be surprising that DISH, with its national footprint, could use its leverage to negotiate lower retransmission consent fees with small broadcasters, which have stations in only a few markets.[101] Notably, the relationship DISH alleges between broadcast station group size and retransmission fees is "driven by a comparison of the retrans fees that DISH pays to certain very small (including many single-station) owners to substantially larger broadcast station groups."[102] If DISH, as it asserts, is unable to negotiate the same low retransmission fees with large station groups as it does with very small broadcasters, this merely suggests that large groups are able to

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[100] ACA Comments at 5; DISH Comments at 7. DISH submitted this economic analysis in its opposition to the proposed merger of Sinclair and Tribune. Petition to Deny of DISH Network, Exhs. D & E, Declarations of J. Ordover and W. Zarakas/J. Verlinda, MB Docket No. 17-179 (Aug. 7, 2017); Reply of DISH Network, Exh. C, Reply Decl. of J. Ordover, MB Docket No. 17-179 (Aug. 29, 2017). In that context, DISH's analysis was refuted by Dr. Gautam Gowrisankaran. *See* Exh. E to Applicants' Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 at ¶ 3 (Aug. 22, 2017) (Gowrisankaran Decl.). NTCA similarly states that MVPDs have experienced significant increases in retransmission fees "due largely to the increased concentration of broadcast stations," but cites no economic evidence supporting its claim. NTCA Comments at 2.

[101] For example, if DISH and a broadcast group with stations in only two small markets were unable to reach a retransmission agreement, the number of DISH's subscribers that lose access to this broadcaster's stations would be extremely small in comparison to the total number of paying subscribers DISH has in all 210 DMAs nationwide. The impact on DISH would be negligible. In contrast, if the small broadcaster could not reach any of DISH's subscribers in its only two markets, then the broadcaster would lose a significant portion of its viewing audience and suffer consequential advertising losses. This dynamic likely gives DISH significant leverage over smaller broadcasters.

[102] Gowrisankaran Decl. at ¶ 85.

negotiate with large pay-TV providers on a more level playing field than the smallest station owners.

The pay-TV industry's apparent preference for negotiating with smaller, weaker broadcasters, however, is not evidence that larger broadcast groups possess harmful market power and are able to extract supra-competitive retransmission fees from pay-TV providers. If anything, broadcast stations' signals appear undervalued in the retransmission consent marketplace. According to Kagan, total broadcast retransmission consent fees were only 14.9 percent of total MVPD programming fees (counting broadcast stations and basic cable, premium cable and regional sports networks) in 2017, even though broadcast stations accounted for nearly one third of prime time viewing in 2017 (live + same day, counting broadcast, cable and DBS).[103]

Given this evidence, it is unsurprising that pay-TV providers have consistently failed to show that retransmission consent compensation is "in any economically meaningful sense 'too high'"; moreover, "absent such a finding," any claim of "consumer harm is economically meaningless."[104] ACA's and DISH's repetitive allegations of consumer harm, like previous MVPD claims, in essence only amount to a claim that

> *pay television providers would charge consumers less for video service if they could get access to one of their key inputs (broadcast signals) for free*. . . . Of course, precisely the same thing could be said about electricity and bucket trucks. The obvious fallacy is that forcing electricity providers and truck manufacturers to

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[103] "Multichannel Programming Fees as a % of Multichannel Video Revenues," database of Kagan, a media research group within S&P Global Market Intelligence (Mar. 2018); Nielsen, U.S. Live + Same Day, 2017. *Accord* Gowrisankaran Decl. at ¶¶ 18-21 (showing that broadcast TV earns less in programming fees than other video programmers, especially if measured on a per-viewer basis). And in 2017, the quarter-over-quarter growth trend in stations' retransmission revenues slowed in all four quarters. Justin Nielson, *TV station retrans revenue growth slows down to 18% in Q4 '17*, Kagan (Mar. 27, 2018).

[104] J.A. Eisenach and K.W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, at 3, Appendix A to Opposition of Broadcaster Ass'ns, MB Docket No. 10-71 (May 18, 2010).

> give pay television operators their products for free would reduce the quantity (and quality) of electricity and bucket trucks supplied, and both pay television operators and, ultimately, consumers would suffer as a result. The same is true for broadcasting.[105]

And, as the Commission previously observed, even if retransmission fees were lower, pay-TV providers are not required to pass through any savings to consumers.[106]

While pay-TV providers understandably preferred the days when retransmission negotiations "typically" resulted in cable operators carrying local broadcasters "for free,"[107] that preference did not warrant FCC intervention into the retransmission consent marketplace,[108] and it does not now justify imposing a stricter national cap on TV stations.[109] Just as the Commission declined to factor pay-TV providers' retransmission consent-related claims into its recent decision to reform the local TV rule,[110] the FCC should reject their self-interested arguments here.[111]

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105 *Id*. at 1-2 (emphasis added). A subsequent study reconfirmed these conclusions. Decl. of J.A. Eisenach and K.W. Caves, Att. A to NAB Comments, MB Docket No. 10-71, at 1 (May 27, 2011) (concluding that MVPD complaints about retransmission fees being "too high" were unfounded "from the perspective of economic efficiency," and rejecting MVPDs' repetitive claims about supposed consumer harm).

106 Notice of Proposed Rulemaking, 30 FCC Rcd 10327, 10330 n.21 (2015).

107 Comments of AT&T, MB Docket No. 15-216, at 3-4 (Dec. 1, 2015).

108 *See* FCC Chairman Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, fcc.gov (July 14, 2016) (declining to change existing retransmission negotiation rules or to adopt new ones).

109 Although the local TV ownership rule is not at issue here, ACA additionally claims that "broadcast consolidation" within the same market leads to higher retransmission prices. ACA Comments at 4. DISH's own economic experts, however, found otherwise. Specifically, DISH's analysis "measure[d] the extent to which joint ownership of two Big 4 stations in a DMA is related to higher retrans fees," and found that "joint ownership is not statistically associated with higher retrans fees." Gowrisankaran Decl. at ¶ 76.

110 *See* Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9838 n.239 (2017).

111 Other pay-TV arguments also have no bearing on the national TV cap. NTCA, for example, argues that retaining the current national cap is essential to deployment and adoption of broadband services in rural areas. NTCA Comments at 7-8. NTCA's logic goes like this: A higher cap will lead to more power for broadcasters in retransmission negotiations, which

V. CONCLUSION

Given that the realities of the modern digital marketplace have eroded the traditional justifications underpinning a broadcast-only national TV ownership rule, those commenters supporting adoption of a *de facto* more restrictive national cap have, unsurprisingly, presented no sound legal or factual bases to justify their position. For all the reasons set forth herein and in our initial comments, NAB urges the FCC to retain the current 39 percent limit and calculate compliance with that cap by accounting for all TV stations at half their theoretical reach, which better reflects today's highly fragmented viewing and advertising markets.

Respectfully submitted,

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will lead to higher retrans fees, which will lead to higher multichannel video service prices for consumers, which will lead to lower consumer adoption of those video services, which will result in decreased consumer adoption of broadband. NAB has already refuted the unconvincing argument that higher retrans fees discourages broadband adoption, and NTCA's argument here is even more attenuated. NAB Written *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71, at 1-3 (Apr. 5, 2016); NAB Reply Comments, MB Docket No. 17-214, at 7-8 (Nov. 9, 2017) (citing, *inter alia*, marketplace evidence that subscriptions to multichannel video services and broadband services are not substantially co-dependent).