

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

In the Matter of	)	
	)	
The State of Competition in the	)	GN Docket No. 24-119
Communications Marketplace	)	

**COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

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*“The audio and video marketplace . . . has undergone significant changes over the past fifty years.”*

*The “explosion of programming distribution sources calls for substantial reform of . . . Commission oversight of the way the broadcasting industry develop and competes.”*

*“To ensure the industry’s ability to compete . . . the Commission must reform Federal policy and the current regulatory framework to reflect the new marketplace realities.”<sup>1</sup>*

**I. INTRODUCTION AND SUMMARY**

As evidenced by the quotations above, nearly 30 years ago when passing the Telecommunications Act of 1996, Congress recognized the substantial changes to the audio and video markets even in the analog era and sought to “preserve and to promote the competitiveness of over-the-air broadcast stations” by reforming the outmoded structural regulatory framework imposed on broadcasting.<sup>2</sup> But despite congressional intent and the total transformation of the audio and video marketplace since 1996 by digital technologies and the internet, the Commission has yet to address in any meaningful way its antiquated broadcast regulatory regime. From its ownership restrictions preventing necessary scale and

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<sup>1</sup> H.R. Rep. No. 104-204, at 54-55 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 18-19.

<sup>2</sup> *Id.* at 48. See *also id.* at 54 (observing that broadcast regulation, particularly FCC-created ownership rules, dated back in many instances to the 1940s).

discouraging investment, to its unwillingness to foster broadcast innovation, to its infatuation with paperwork and compliance burdens that serve to check political boxes more than the effective pursuit of important substantive goals, the FCC consistently refuses to consider how its regulatory approach imperils the competitive viability of local television and radio stations. Consequently, the Commission also fails to address, let alone answer, the fundamental question of how radio and TV broadcasters burdened by highly asymmetric regulations – and facing unprecedented competition for audiences and advertising revenues from much larger competitors – will be able to continue providing valued programming services, including news, increasingly expensive sports programming, weather, and emergency information, free to the public in local communities across the nation. Indeed, the Commission takes for granted that broadcasters must provide a service at their own expense but free to the public, even though it is a unique and enormous public service obligation: only radio and TV stations are required to provide their products directly to the public through local outlets for free.

Contrary to Congress’s clear intent evidenced in major legislation to “ensure that our system of free broadcasting remain vibrant,”<sup>3</sup> the Commission has never addressed how the math will continue to add up for free, over-the-air (OTA) broadcasting. If the FCC continues to ignore this vital question, at some point the industry’s asymmetric burdens may well lead some broadcasters to conclude that the best competitive strategy may be a shift to offering audio and video content via unregulated platforms – and at a price to consumers.

The FCC should consider these important questions in preparing its upcoming report to Congress on competition in the communications marketplace. The 2024 report should take seriously the obligation to address “all forms of competition,” including intermodal and

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<sup>3</sup> S. Rep No. 10-92, at 36 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1169.

competition from new and emerging services, and evaluate how the digital and internet revolutions have transformed “competition to deliver” video and audio services and placed significant and increasing competitive stress on the public’s free OTA broadcast services.<sup>4</sup>

As the National Association of Broadcasters (NAB)<sup>5</sup> illustrates below, trends we identified in earlier FCC proceedings continue apace, with radio and television broadcasters experiencing ever-greater competition for audiences and advertising from myriad lesser (or un-) regulated audio and video content providers and from digital advertising platforms. Data from leading industry analysts, including Nielsen, Edison, Borrell, and BIA, all confirm that local broadcast stations have lost significant audience share and advertising revenues to their audio, video, and advertising market competitors. Edison Research concluded after its most recent annual surveys that internet access is nearly universal and that the smart device triumph is nearly total, resulting in an audio and video marketplace unrecognizable to consumers of traditional local media in the analog era. Streaming now dominates the video marketplace, outpacing both broadcast TV and cable, and AM/FM radio (OTA and streams combined) garners just over one-third of Americans’ time spent listening to audio sources.

These fundamental market and technological changes have necessarily and dramatically affected the competitive position of advertising-supported free OTA radio and TV stations. The Commission, however, still refuses to admit that these transformative changes should in any way impact its broadcast regulatory regime or even to recognize that regulation is not costless. Indeed, rather than considering the cumulative toll that all its existing

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<sup>4</sup> FCC, *Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, Public Notice, GN Docket No. 24-119, DA 24-374, at 1 (Apr. 22, 2024) (Notice) (citing 47 U.S.C. §§ 163(d)(1) & (b)(1)).

<sup>5</sup> NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

broadcast rules impose, the FCC appears intent on increasing the harm caused by its asymmetric regulation of OTA broadcasting via a series of additional rulemakings and proposed rules uniquely burdening radio and TV stations, increasing compliance risk for recordkeeping rules with vanishingly small public benefit, and discouraging investment in the broadcast industry. Notably, in maintaining and increasing restrictions on TV stations and in slowing broadcast innovation, the Commission has indulged broadcasters' marketplace competitors – specifically, the pay TV industry – in their deliberate strategy to impair broadcast stations. The 2024 report should consider the pay TV industry's rent-seeking strategy and the harm it causes to competition in the video marketplace.

Beyond recognizing here the unprecedented level of competition in today's media and advertising markets and how that competition has impacted local stations and their ability to offer OTA services free to the public, the Commission in further proceedings must overhaul its competitively harmful broadcast regulatory regime. This effort should include revision of the outdated radio and TV ownership restrictions, which pre-date internet ubiquity, the proliferation of digital devices, and widespread adoption of audio and video streaming services, as well as the growth of "Big Tech." Reforming analog-era structural ownership rules will help broadcasters achieve reasonable scale and enable the industry to better attract vital investment. In addition, the FCC must take a hard look at regulatory policies that place speedbumps in the path of broadcast innovation but do not similarly burden the deployment of improved technologies by other participants in the communications marketplace. Rather than reflexively viewing broadcast innovation as a potential basis for more stringent regulation, the Commission should acknowledge that broadcasters need significant resources to invest in innovations such as ATSC 3.0, and actively seek ways to promote deployment of broadcast technologies enabling enhanced services to the public. Finally, the

Commission must rethink its “we can regulate broadcasting so we must” mindset and carefully consider how broadcast regulatory requirements in total burden the public’s free radio and TV services and discourage investment in their future.

## **II. COMPETITION TO BROADCASTERS FROM MYRIAD, AND OFTEN MASSIVE, VIDEO AND AUDIO SOURCES AND ADVERTISING PLATFORMS ONLY CONTINUES TO GROW**

NAB already has documented the transformation of the media and advertising markets due to internet ubiquity; the widespread adoption of myriad digital devices for accessing almost infinite sources of online audio and video content available 24-7-365; and the remarkable growth of the giant technology platforms to dominate the local and national advertising market.<sup>6</sup> We also demonstrated how these fundamental market changes have profoundly affected the competitiveness of advertising-reliant free OTA radio and TV stations. Rather than repeat all these previous lengthy submissions, NAB summarizes and illustrates the extent to which competition from nonbroadcast sources – often exponentially larger than any broadcast stations or groups – now impact the viewership, listenership, and advertising revenues of local broadcast stations.

To start, the internet has become the dominant communications medium. As shown by the 25th anniversary edition of Edison Research’s *The Infinite Dial* in 2023 and in its newest edition:

- Internet access is nearly universal, rising from 31 percent in 1998 to 95 percent in early 2023;<sup>7</sup>

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<sup>6</sup> See, e.g., Comments of NAB, MB Docket No. 22-459 (Mar. 3, 2023); Comments of NAB, GN Docket No. 22-203 (July 1, 2022) (2022 Competition Comments); Reply Comments of NAB, GN Docket No. 22-203 (Aug. 1, 2022); Comments of NAB, MB Docket No. 18-349 (Sept. 2, 2021); Reply Comments of NAB, MB Docket No. 18-349 (Oct. 1, 2021).

<sup>7</sup> Edison Research, *The Infinite Dial 2023* at 3 (Mar. 2, 2023) (*Infinite Dial 2023*). According to Leichtman Research Group (LRG), 92 percent of households got an internet service at home in 2023, up from 83% in 2018. LRG, *92% of U.S. Households Get An Internet Service At Home*, Press Release (Dec. 11, 2023).

- Digital devices for accessing the internet and online content that did not exist in 1998 are now nearly universal, with 91 percent of Americans age 12+ having a smartphone in 2023;<sup>8</sup>
- In 1998, only six percent of Americans 12+ had ever listened to online audio, but in 2023, 70 percent had listened to online audio *in the past week*;<sup>9</sup>
- In 1998, social media did not exist, while in 2023, 82 percent of Americans age 12+ used social media;<sup>10</sup>
- In early 2024, Edison declared the “‘smart’ device triumph is nearly total,” reporting that 93 percent of Americans age 12+ own a smartphone, smart TV and/or smart speaker, with smart TV ownership rising quickly;<sup>11</sup> and
- Other analysts have confirmed the triumph of digital devices, with 88 percent of TV households having at least one internet-connected TV device in 2023, up from only 44 percent in 2013,<sup>12</sup> and with smartphone ownership surpassing TV ownership for the first time.<sup>13</sup> The average number of connected devices per U.S. internet household reached 17 in Q3 2023.<sup>14</sup>

Unsurprisingly, Americans’ wholesale adoption of digital devices has transformed how they consume video and audio content. Nearly nine in ten (88 percent) of U.S. households have at least one streaming video service from 15 leading subscription video on demand

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<sup>8</sup> Infinite Dial 2023 at 11.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 22.

<sup>11</sup> Edison Research, *The Infinite Dial 2024*, at 7-8, 10 (Mar. 28, 2024) (Infinite Dial 2024) (reporting that 72 percent of U.S. population 12+ owned a smart TV). Hub Entertainment Research reported that in Q1 2024, nearly 80 percent of U.S. households had a smart TV. G. Winslow, *Hub: Smart TVs Now in Nearly 8 of 10 Homes*, tvtechnology.com (Apr. 10, 2024).

<sup>12</sup> LRG, *49% Of Adults Watch Video Via A Connected TV Device Daily*, Press Release (June 2, 2023). Internet-connected TV devices include smart TVs, stand-alone streaming devices (e.g., Roku, Amazon Fire TV sticks, Apple TV), connected video game systems, and/or connected Blu-ray players.

<sup>13</sup> G. Winslow, *CES2024: Smartphone Ownership Surpasses TV Ownership in U.S. for the First Time*, tvtechnology.com (Jan. 11, 2024) (citing Parks Associates data).

<sup>14</sup> *Id.* (also reporting that 92 percent of U.S. households have fixed or wireless internet service at home).

(SVOD) and direct-to-consumer (DTC) services, and 53 percent of households have four or more streaming video services.<sup>15</sup> In 2023, about half of adults watched video via a connected TV device daily, up from only six percent in 2013,<sup>16</sup> and a recent survey by LG reported that nearly 70 percent of connected TV users prefer free, ad-supported streaming TV (FAST) content, instead of a paid subscription without ads.<sup>17</sup> A 2024 streaming TV survey found that Americans are now choosing streaming as their default source for viewing content, with 73 percent reporting streaming as their first destination for content.<sup>18</sup>

These shifts in device usage and viewing patterns are reflected in Nielsen's monthly snapshot of total TV and streaming usage, *The Gauge*. As shown below, in July 2023, streaming's share of total TV usage was nearly double broadcast TV's share (and well ahead of cable/satellite), with YouTube's share alone (9.2 percent) approaching half of the share of all broadcast TV (20.0 percent).<sup>19</sup> And many younger consumers are ditching TV shows and movies on streaming services in favor of yet other video options. Almost half (47 percent) of Gen Zs and a third of millennials surveyed by Deloitte said their favorite form of video content is social media videos and live streams.<sup>20</sup>

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<sup>15</sup> LRG, *10% Of Streaming Video Services Are Borrowed From Someone Else*, Press Release (Mar. 20, 2024).

<sup>16</sup> LRG, *49% Of Adults Watch Video Via A Connected TV Device Daily*, Press Release (June 2, 2023).

<sup>17</sup> E. Gruenwedel, *LG: Majority of Connected TV Users Prefer Free, Ad-Supported Streaming Video*, [mediaplaynews.com](https://mediaplaynews.com) (Apr. 4, 2024). Ad-supported streaming services not only compete with TV broadcasters for audiences, they also directly compete for advertising revenues.

<sup>18</sup> G. Winslow, *Survey: Streaming Is First Content Destination for 73% of Viewers*, [tvtechnology.com](https://tvtechnology.com) (Mar. 5, 2024). A majority of free streamers (52%) utilize three or more services, and paid streamers have increased from using an average of three services to four.

<sup>19</sup> In March 2024, YouTube accounted for 9.7 percent of total U.S. television usage, up from six percent in March 2022. D. Frankel, *YouTube Now Controls 9.7% of U.S. Television Usage*, *Nielsen Says*, [nexttv.com](https://nexttv.com) (Apr. 17, 2024).

<sup>20</sup> Deloitte Insights, *2024 Digital Media Trends*, at 19 (Mar. 20, 2024).



## The Gauge™

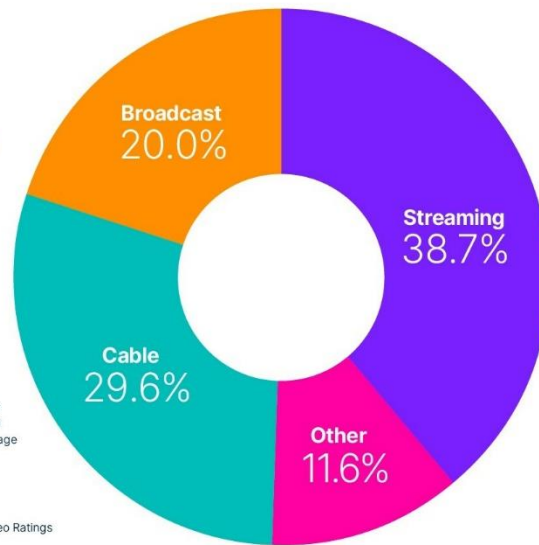
Nielsen's Total TV and Streaming Snapshot

July 2023

Total Day | Persons 2+

Linear Streaming (VMVPD/MVPD) Apps have been removed from the Streaming category. They have also been removed from Other Streaming and Hulu and Youtube now reflect usage to Hulu SVOD and Youtube Main without their respective VMVPD's (Hulu Live and Youtube TV).

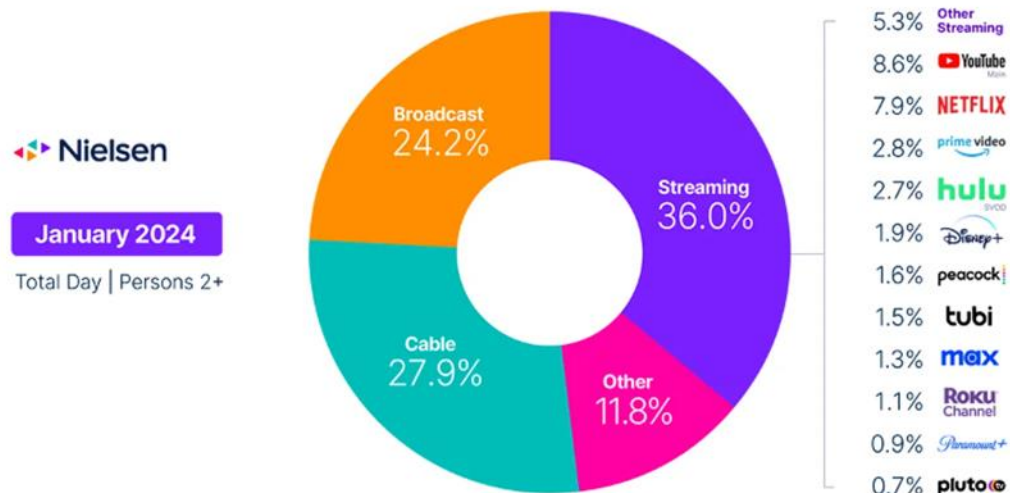
Methodology available @ [www.nielsen.com/thegauge](http://www.nielsen.com/thegauge)  
Source: Nielsen National TV Panel Data plus Streaming Video Ratings  
Percentages may not sum to 100 due to rounding  
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Revealing broadcast TV's increasing reliance on live sports programming to attract viewers, broadcast TV's share of total TV usage rose to 24.2 percent in January 2024 according to Nielsen, due to highly watched sporting events, especially the NFL playoffs. Retaining the rights to astronomically expensive sports programming is a must for broadcast TV, and after losing significant sports programming to cable, broadcasters are now fighting streaming services, including those owned by the giant tech platforms, for sports rights. Amazon especially has moved strongly into sports programming, gaining exclusive rights to Thursday night NFL games and bidding to become the NBA's third national partner.<sup>21</sup> The new sports streaming service announced by Disney, Warner Bros. Discovery, and Fox in

<sup>21</sup> See, e.g., T. Baysinger, *Amazon's big league ambitions*, [axios.com](https://www.axios.com) (May 19, 2024); T. Spangler, *Amazon Snags Exclusive Rights to NFL Playoff Game for 2024-25 Season*, *Variety* (Feb. 9, 2024); A. Webster, *Apple might be the streaming home of soccer's next big tournament*, [theverge.com](https://www.theverge.com) (Apr. 22, 2024); D. Saul, *Nextflix Announces First Major Venture Into Live Sports: \$5 Billion Deal for WWE's Raw*, [forbes.com](https://www.forbes.com) (Jan. 23, 2024); D. Frankel, *Netflix Signs NFL Deal, Two Live Christmas Day Games Coming to Streaming Service*, [nexttv.com](https://www.nexttv.com) (May 15, 2024).

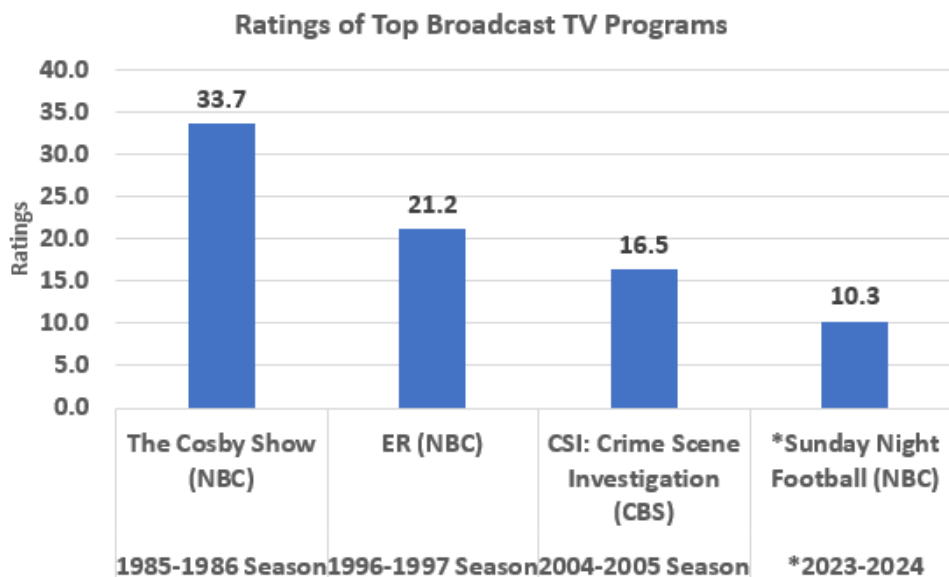
February to provide professional and collegiate sports programming will be named Venu Sports and is set for launch this fall.<sup>22</sup>



Sunday Night Football has been the top-rated regularly scheduled program on broadcast TV for years and, as shown below, remained the top broadcast program in the 2023-2024 season. But even the ratings garnered by the most popular broadcast TV show have declined substantially over time due to competition from cable and now also from streaming, with the ratings garnered by Sunday Night Football during the past season being less than one-third of the ratings earned by the top broadcast TV show during the 1985-1986 season. And the top-rated regularly scheduled scripted program on broadcast TV for the 2023-2024 season (*Tracker*, on CBS) garnered a 4.7 household rating according to Nielsen, only about one-seventh of the ratings earned by the top broadcast show in the mid-1980s.

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<sup>22</sup> Reuters, *Disney, Fox, Warner Bros Discovery sports-streaming venture named Venu Sports* (May 16, 2024).



**Sources and Notes:**

1985-1986, 1996-1997, 2004-2005 Seasons: *Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present*.

Household ratings based on Live-Only viewing.

\*2023-2024: *Nielsen, Live +Same Day viewing, September 10, 2023-February 11, 2024. Regularly scheduled program; excludes pre- and post-shows.*

Turning to competition in the audio marketplace, local radio stations face fierce and ever-increasing competition for audiences. As shown below, in May 2014, AM/FM radio's share of all the time consumers spent listening to audio sources was 52.1 percent. But by the end of 2023, broadcast radio's share had fallen to 36 percent (counting both OTA and radio streams), while time spent with "pure play" streaming (e.g., Pandora, Spotify), YouTube (music and music videos only), and podcasts had all increased substantially.<sup>23</sup> Moreover, time spent with on-demand audio last year passed time spent with linear audio.<sup>24</sup>

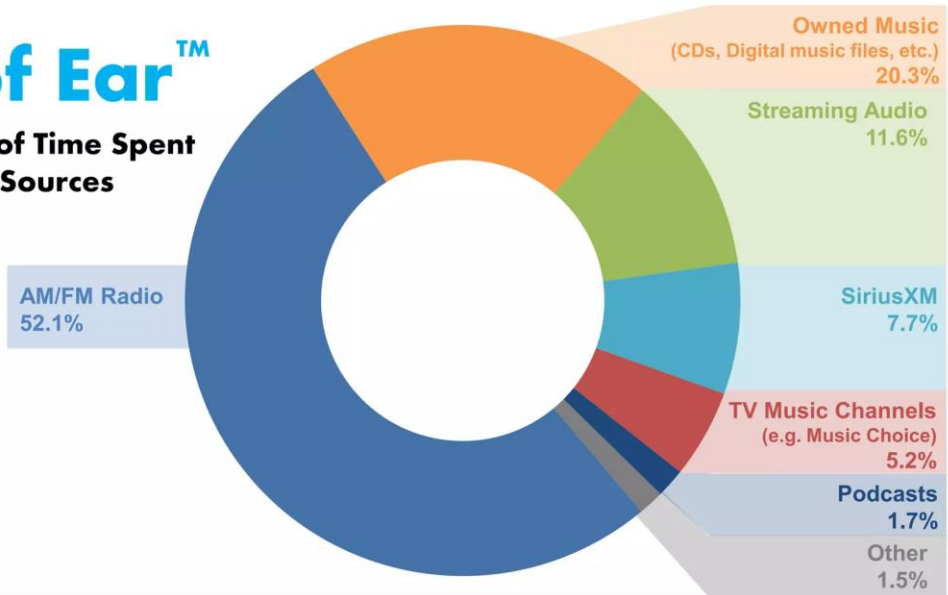
<sup>23</sup> With 34 percent of the total U.S. population 12+ now listening to podcasts at least weekly, the podcast audience is nearing the "landmark 100 million weekly listeners." Infinite Dial 2024 at 24.

<sup>24</sup> *Edison Research Issues Top 10 Favorite Findings of 2023*, Radio Online (Dec. 13, 2023). As of Q2 2023, 50.3 percent of all daily audio time consumed by those age 13+ was on on-demand platforms (e.g., streaming, podcasts, owned music), while 49.7 percent was on linear platforms (e.g., OTA radio, radio streams, Pandora's free radio service, satellite radio). Edison Research, *Weekly Insights 8.23.2023 On-Demand Audio Passes Linear Audio* (Aug. 23, 2023).

May 2014

# Share of Ear™

Americans' Share of Time Spent Listening to Audio Sources

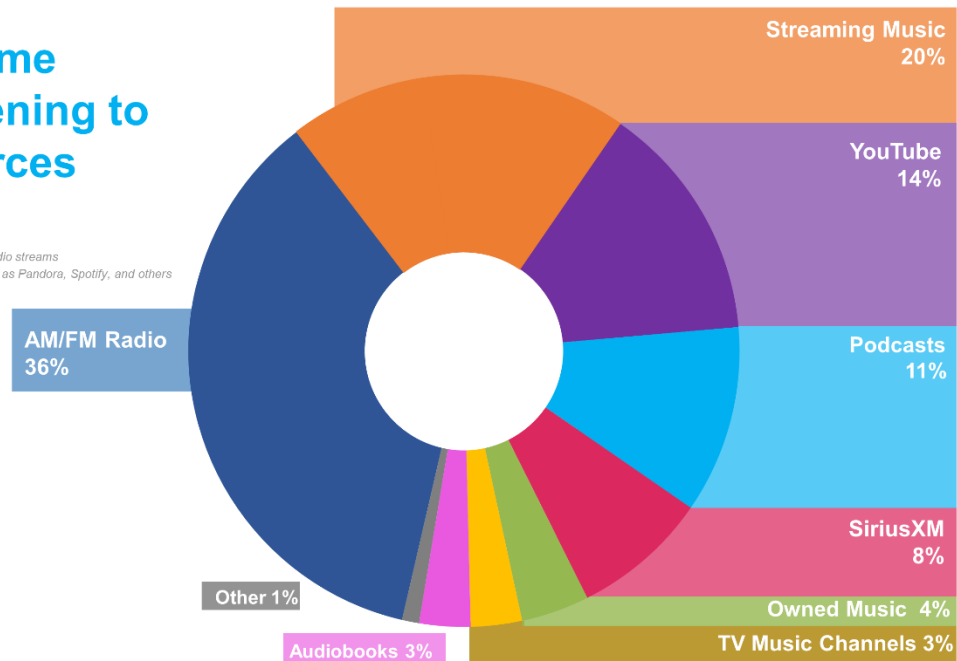


Source: Edison Research. Americans spend an average of 4 hours and 5 minutes each day consuming audio. This graph represents the share of time spent with each. The Streaming Audio category includes Internet Radio and On-Demand Audio services. Internet Radio includes: Pandora, iHeartRadio, iTunes Radio, Last.fm, Slacker, Songza, Stitcher and other Internet Radio services. On-Demand Audio includes: Beats, Spotify, Google Play All Access, Rdio and Rhapsody. Based on a nationally representative sample of 2,096 Americans ages 13+ who completed a 24-hour audio listening diary. May 2014. For more information contact [info@edisonresearch.com](mailto:info@edisonresearch.com)

## Share of Time Spent Listening to Audio Sources

U.S. Population 13+

YouTube for music and music videos only  
AM/FM Radio includes over the air and radio streams  
Streaming Music includes pure plays such as Pandora, Spotify, and others



Edison Research Share of Ear Audio Dial™ Q1 – Q4 2023

Consumers also are increasingly willing to pay for audio subscriptions, with more than half of Americans now paying for an audio service.<sup>25</sup> eMarketer reported that 133.8 million Americans of all ages were paid digital audio subscribers in 2022, and estimated that number would rise to 141.7 million in 2023 and to 153.6 million by 2026.<sup>26</sup> In 2023, U.S. on-demand audio streaming grew 12.7 percent over 2022, to 1.2 trillion songs streamed, and on-demand song streaming, counting audio and video, increased 14.6 percent, to 1.5 trillion songs streamed.<sup>27</sup>

Clearly, the competition local radio stations face from digital options only continues to grow, as consumers increasingly listen (and subscribe) to non-broadcast streaming services, podcasts, music videos, and even audiobooks, accessible via myriad digital devices. In late 2023, consumers reported listening to digital audio predominantly on smartphones but also reported using smart TVs, laptops, tablets, smart speakers, desktop computers, streaming devices (e.g., Apple TV), and gaming consoles (e.g., Xbox).<sup>28</sup> Technological change and device adoption also have substantially enhanced competition to AM/FM radio in automobiles. In 2013, 84 percent of adults reported currently using AM/FM radio in the car; by 2024, that number had fallen to 70 percent.<sup>29</sup> Use of online audio in the car, in contrast, rose from 12

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<sup>25</sup> R. Crupnick, *MusicWatch Reports Results of 2023 Annual Music Study: Record Numbers of Music Streamers and Paid Subscribers*, musicwatchinc.com (Mar. 11, 2024) (also reporting that over 90% of internet users are streaming music in U.S.).

<sup>26</sup> M. Willens, *US Digital Audio Users 2022*, emarketer.com (Dec. 21, 2022). eMarketer counts each individual account in qualifying family plans as a unique subscriber and includes paid promotional subscribers and free trial users as well.

<sup>27</sup> *34% global streaming growth uplift: Luminate releases 2023-year end music report*, recordoftheday.com (Jan. 10, 2024); *2023 Luminate Year-End Music Report* (Jan. 10, 2024).

<sup>28</sup> <https://www.statista.com/forecasts/997213/digital-audio-usage-by-device-in-the-us>

<sup>29</sup> Infinite Dial 2023 at 52; Infinite Dial 2024 at 15.

percent of adults in 2013 to 55 percent in 2024.<sup>30</sup> And other audio sources not surveyed or not in existence in 2013, including podcasts, Apple Car Play, and Android Auto, are now used with increasing frequency in cars.<sup>31</sup>

The growth and development of the internet, along with the near ubiquity of digital devices, also have transformed the advertising market and undermined the economic bases supporting the public's free OTA radio and TV services. As Borrell Associates has shown, over the course of about a decade, digital platforms have come to dominate advertising markets, with nearly 68 percent of all local advertising going to out-of-market digital platforms in 2022, with digital's share projected to rise to 74 percent by 2026.<sup>32</sup> Three out-of-market Big Tech companies (Amazon, Google and Facebook (Meta)) controlled 53 percent of all local advertising in 2022, with an additional 14 percent controlled by other out-of-market digital platforms.<sup>33</sup> Borrell explained that, for nearly two decades, local businesses have been spending progressively smaller percentages of their total ad budgets on traditional forms of advertising and more on internally controlled "owned" media, such as their own websites and social media pages.<sup>34</sup> Borrell's graphic below illustrates the rapid growth of digital media in

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<sup>30</sup> *Id.*

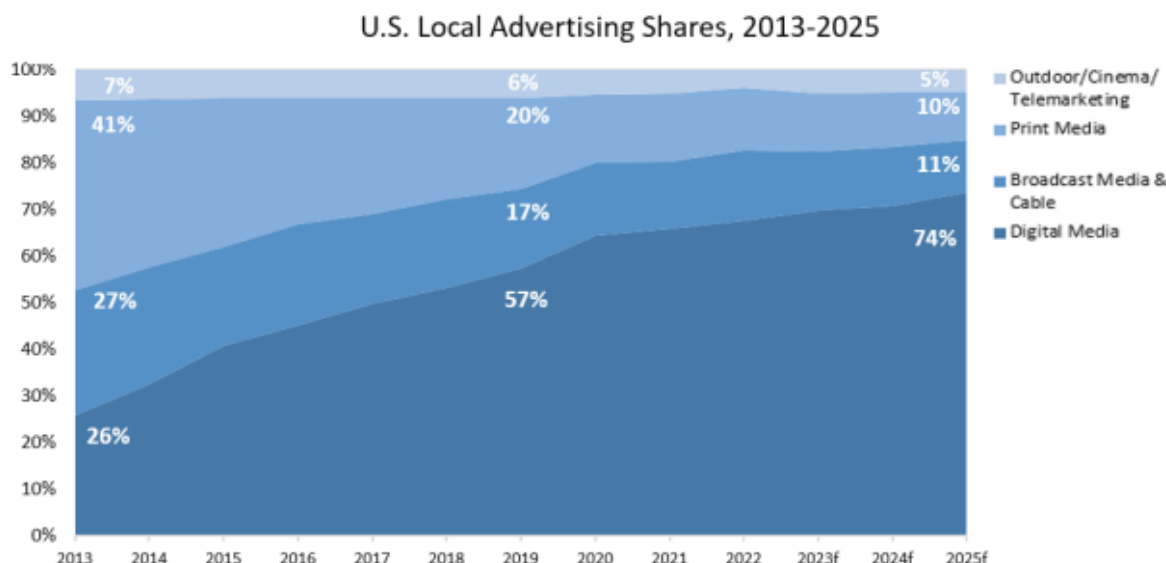
<sup>31</sup> In 2024, 32 percent, 16 percent, and 10 percent of adults reported using, respectively, podcasts, Apple Car Play, and Android Auto in the car. Use of Sirius/XM in cars rose from 15 percent of adults in 2013 to 22 percent in 2024. *Id.*

<sup>32</sup> Gordon Borrell, Chief Executive Officer, Borrell Associates, *2023 Digital Advertising Report*, Exh. F to Comments of Connoisseur Media, et al., MB Docket No. 22-459, at 2-3 (Mar. 3, 2023) (Borrell 2023 Advertising Report).

<sup>33</sup> *Id.* at 2. eMarketer has confirmed Big Tech's dominance, with five companies (Amazon, Apple, Google, Meta, and Microsoft) more than doubling their share of the entire U.S. digital ad market since 2008. M. Yuen, *Big Tech accounts for nearly two-thirds of the US digital ad market*, eMarketer (Mar. 18, 2024) (reporting that Big Tech's share of market rose from 30.8% in 2008 to 65.6% in 2024).

<sup>34</sup> Borrell 2023 Advertising Report at 3.

local ad markets, with the resulting decline in the local ad shares garnered by broadcast radio/TV (and cable) and print media.



This reshaping of local advertising markets has undercut the economic support for local media and journalism, as the fate of local newspapers and the growing struggles of local broadcast stations illustrate.<sup>35</sup> As Borrell documented below, just since 2017, the average annual expenditure on TV advertising for local businesses buying TV spots fell 68 percent, and the average radio budgets by local businesses buying radio commercials dropped 46 percent.<sup>36</sup> The Commission has never grappled with what this fundamental reordering of the local advertising market means for the competitive viability of local radio and TV stations and, in turn, their ability to serve their local communities. With the

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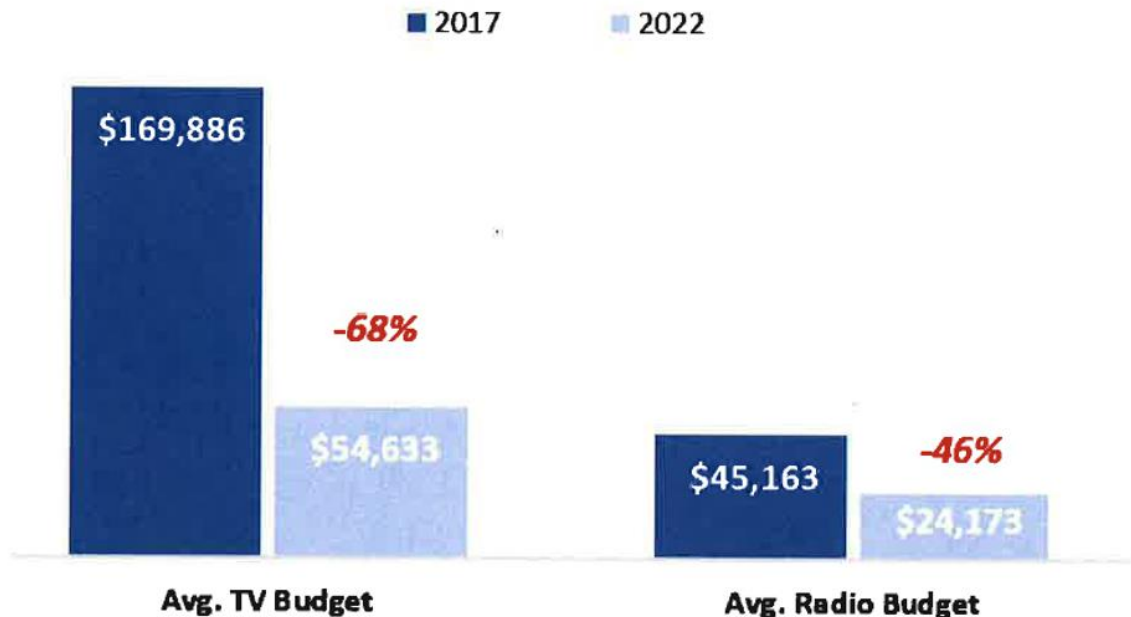
<sup>35</sup> The decline of local newspapers accelerated in 2023, leading analysts to project that by the end of 2024, the U.S. will have lost *one-third* of the newspapers it had in 2005. S. Fischer, *One-third of U.S. newspapers as of 2005 will be gone by 2024*, *axios.com* (Nov. 16, 2023) (citing report from Medill School at Northwestern University).

<sup>36</sup> Borrell 2023 Advertising Report at 4.

newspaper industry as an example, the FCC has no excuse to ignore the similar dangers now facing local broadcast stations and their news operations.

### Average Annual Expenditure for Local TV, Radio Advertisers

Source: Borrell Associates, February 2023



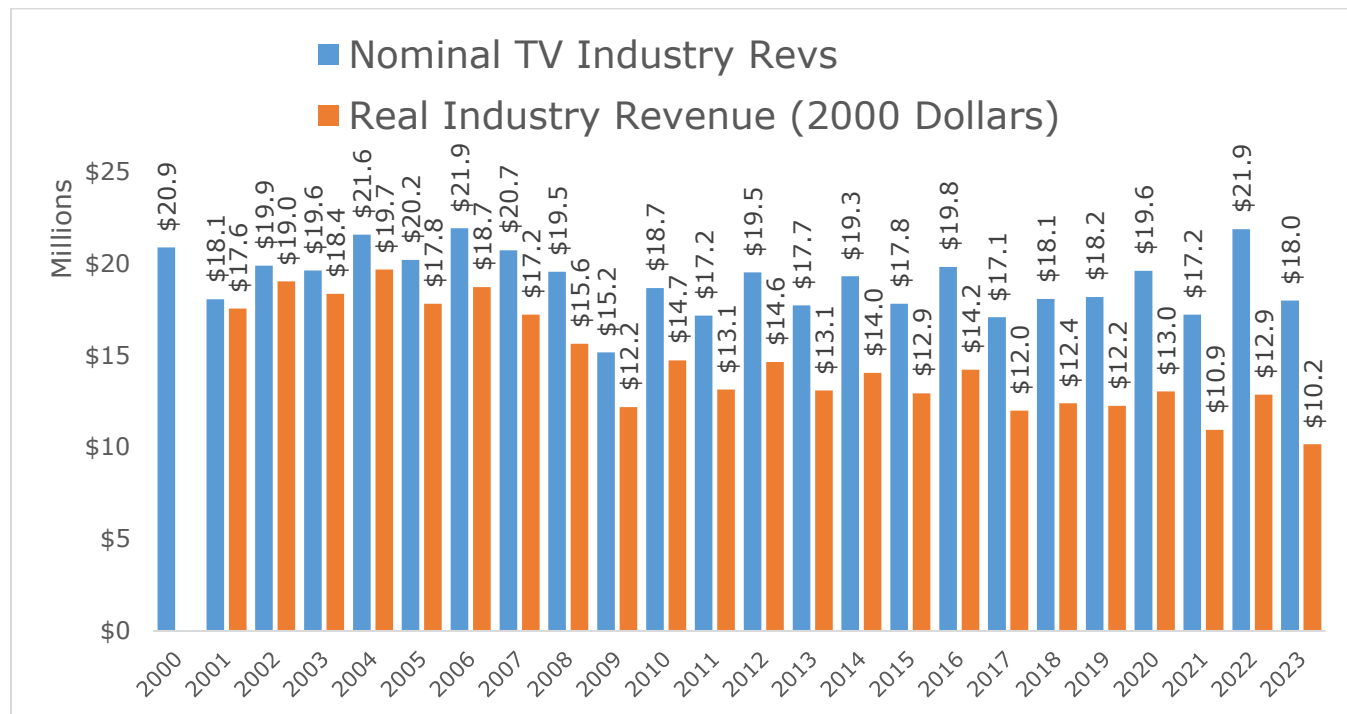
Looking at BIA data on local TV stations' total advertising revenue (OTA+digital), as summarized below, those revenues fell 38.3 percent from 2000-2022, on an inflation-adjusted basis.<sup>37</sup> As NAB has explained before, adjusting for inflation reveals the real amount of the decline.<sup>38</sup> Declines in real revenue must necessarily harm the ability of local TV

<sup>37</sup> From 2000-2023, the inflation-adjusted ad revenue decline was a much greater 51.2 percent, but comparing a Presidential election (and Summer Olympics) year to a non-election year can give a non-representative result. Comparing 2007 (broadcast TV's non-election year, pre-Great Recession advertising peak) to 2023, TV station revenues have declined 13 percent even on a nominal basis.

<sup>38</sup> Inflation is often a significant component of apparent growth (or non-growth) in any series measured in dollars. Adjusting for inflation uncovers real revenue growth, if any, or the real amount of any decline over time. See Comments of NAB, MB Docket No. 18-349, at 95 (Sept. 2, 2021).

stations to pay for acquiring or producing programming, hiring and retaining talented staff, and investing in improved technologies, including Next Gen TV.

#### Nominal and Real TV Station Industry Advertising Revenue (OTA+Digital)

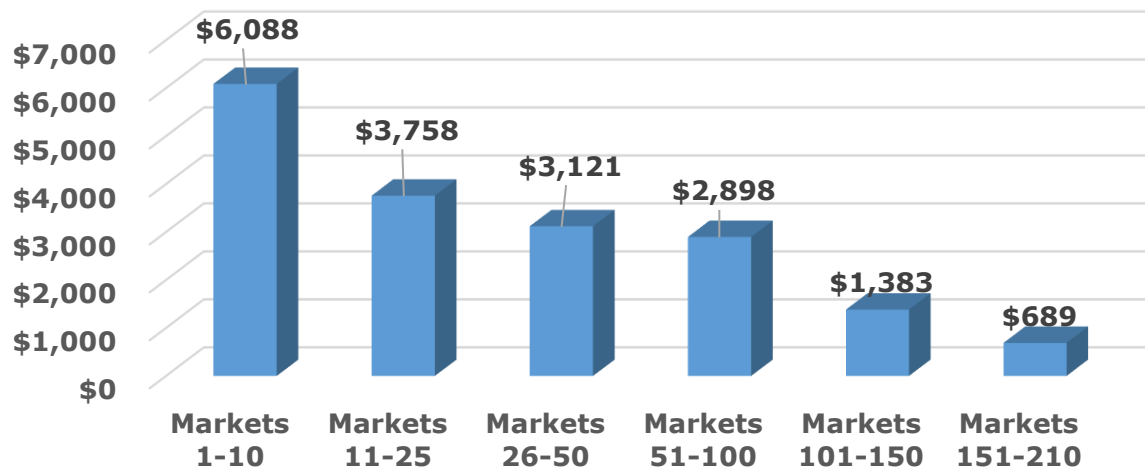


Source: BIA Advisory Services, LLC

Not only are local TV stations struggling – and failing – to maintain their advertising revenues, stations in mid-sized and small markets continue to earn only a small fraction of the ad revenues garnered by stations in the largest markets. As shown below, in 2023, the average TV station in DMAs 151-210 earned merely 10.8 percent of the revenues of the average station in the top-10 DMAs. Similarly, stations in DMAs 101-150 and 51-100 garnered only 15.3 percent and 21.7 percent, respectively, of the revenues earned by the average station in the ten largest DMAs. Even TV stations in DMAs 26-50 garnered only 37.6 percent of revenues of the average station in the ten largest markets. As a result, local stations in mid-sized and small markets face considerably greater challenges in program production and acquisition, investment in station plant, and employee training and retention.

## The Relationship Between Market Size and Advertising Revenue Per TV Station

### 2023 Television Market Revenues (in millions)



	Markets 1-10	Markets 11-25	Markets 26-50	Markets 51-100	Markets 101- 150	Markets 151- 210
<b>Number of Commercial Stations</b>	152	160	207	333	225	160
<b>Avg. Revenue per Station (000)</b>	\$40,051	\$23,485	\$15,079	\$8,702	\$6,147	\$4,307

Source: Analysis of BIA Media Access Pro data as of May 1, 2024. Analysis based on full power stations only. Satellites are excluded from analysis.

Local TV stations, moreover, cannot count on growing retransmission consent revenues to compensate for falling ad revenues, including as a source of support for maintaining local news operations. Analysts have warned that local TV news is becoming a “casualty of the streaming wars,” as cord cutters not only cut their cable channels but also the local TV stations included in their cable/satellite bundles.<sup>39</sup> As a result, local stations lose viewers and the retransmission consent fees associated with those viewers. “Some 40 million households for which local stations used to be compensated as part of the cable

<sup>39</sup> Tom Rogers, *Local News Is Being Pushed Up a Creek as a Casualty of the Streaming Wars*, Newsweek (Apr. 4, 2024).

bundle . . . now provide no local station revenue.”<sup>40</sup> This is yet another threat to the viability of local TV stations and local journalism that the FCC has yet to recognize, let alone address. The Commission should begin to address this specific problem by refreshing the record in its long-pending virtual MVPD proceeding, as NAB has urged.<sup>41</sup>

Examining local radio stations’ total OTA and digital advertising revenues over time (2007-2027) in the BIA graphic below, it remains clear, as the Commission previously found,<sup>42</sup> that the radio industry’s revenues never fully recovered from and have never surpassed the level of revenues reached prior to the recession of 2008-2009. Earlier BIA reports showed that radio station ad revenues (counting over-the-air only at that time) peaked at \$17.6 billion in 2004, 2005, and 2006.<sup>43</sup> Compared to their \$17.6 billion peak, radio revenues were nearly one-quarter (24.4 percent) lower in 2023, even on a nominal basis without adjusting for inflation.

BIA’s recent data and projections below also show that the 2020 pandemic and related recession had a serious impact on radio station ad revenues, with those revenues not yet reaching, and not projected to reach again even through 2027, the (lower) level achieved in 2019.<sup>44</sup> Other industry analysts have confirmed that radio station advertising revenues

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<sup>40</sup> *Id.*

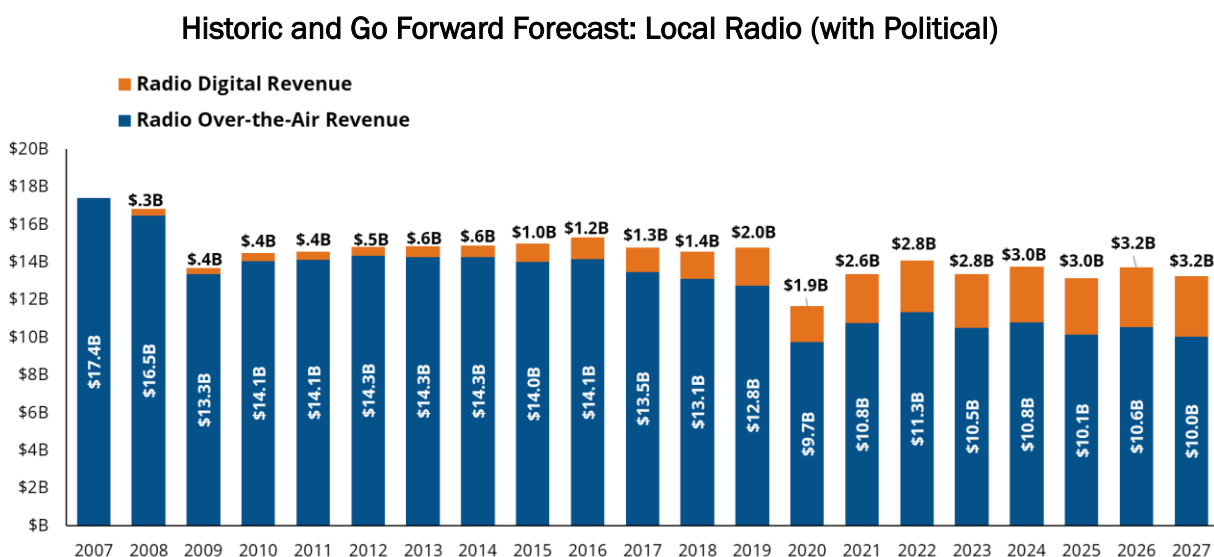
<sup>41</sup> *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014); see, e.g., NAB Notice of Ex Parte Communication, MB Docket No. 14-261 (Feb. 7, 2023).

<sup>42</sup> See *2022 Communications Marketplace Report*, 37 FCC Rcd 15514, at ¶ 303 & Fig.II.F.3 (2022).

<sup>43</sup> BIA Advisory Services, *Local Radio Station Viability in the New Media Marketplace*, at 10 & Fig. 7 (Apr. 19, 2019), Attachment A to NAB Comments, MB Docket No. 18-349 (Apr. 29, 2019) (showing local radio station revenues and projections 2003-2023).

<sup>44</sup> On an inflation-adjusted basis, radio station ad revenues fell 26.4 percent from 2007-2023.

through 2028 will not approach that lower level of revenues earned in years prior to the 2020 pandemic recession (let alone before the 2009 recession).<sup>45</sup>



Source: BIA U.S. Local Advertising Forecast 2024, Issued March 2024

Note: Digital radio advertising includes local advertising sold by local stations (streaming, email advertising, O&O banners, SEM (not SEO), website advertisements) and pure-play streaming services except CTV/OTT. Includes the share retained by local radio stations after reselling other online platforms (e.g., Google AdWords). © 2024 BIA Advisory Services. All Rights Reserved.

Not only has the local radio industry suffered from declining advertising revenues for years (which even the growth of digital ad revenues has not stemmed), radio stations in mid-sized and small markets earn mere fractions of the revenues garnered by stations in the top-10 markets, due to the much smaller population and advertising bases in those markets. For example, in 2023, the average station in the smallest Nielsen Audio markets (201-246) earned only 8.1 percent of the ad revenues garnered by the average station in the ten largest markets. Similarly, the average station in markets 151-200, 101-150, 76-100, and 51-75 earned only 10.9 percent, 12 percent, 14 percent, and 21.5 percent, respectively, of the

<sup>45</sup> See J. Nielson, *Broadcast outlook 2024: Challenges, opportunities facing US TV, radio stations*, Kagan Market Intelligence (Feb. 16, 2024) (showing U.S. radio station ad revenues and projected revenues 2013-2028).

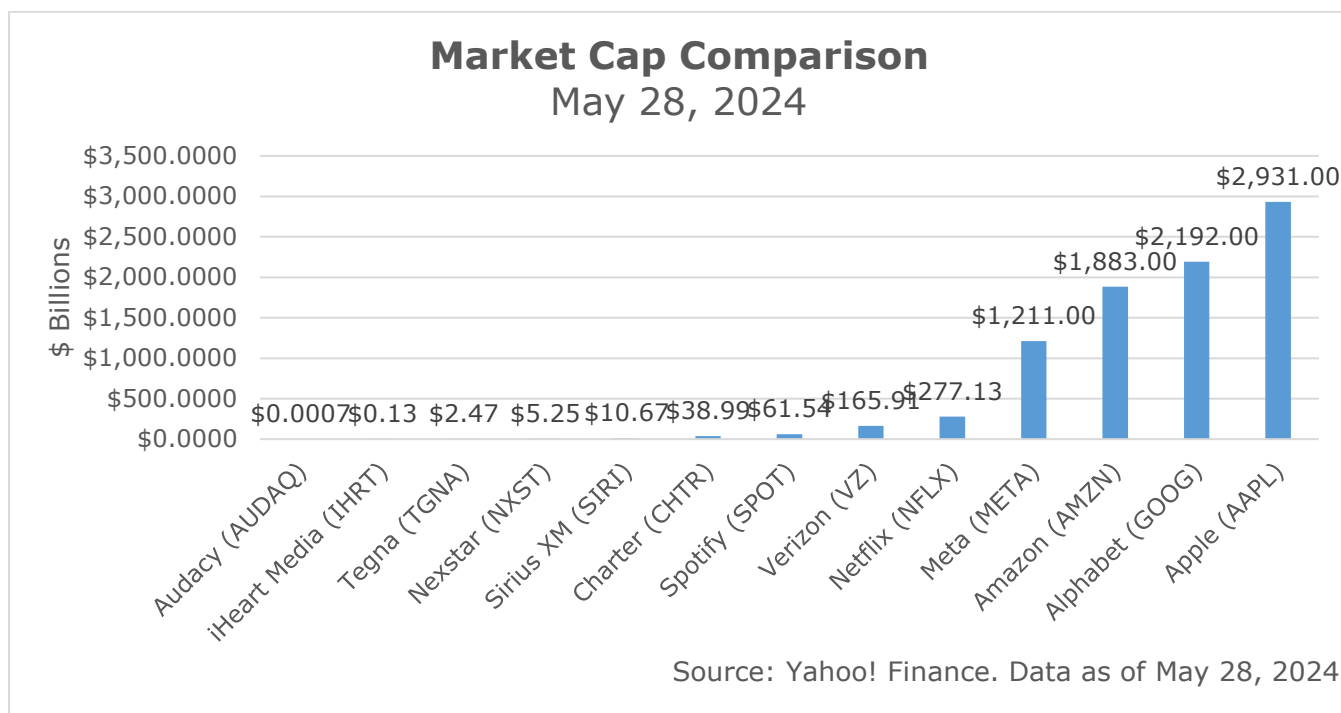
revenues garnered by the average station in the top-10 markets. Even the average station in markets 26-50 garnered only 35.3 percent of the average station's revenues in the largest markets. Given the low – and in some markets, truly miniscule – level of ad revenues earned by many local radio stations, the Commission can only expect these stations to struggle to serve their local communities, due to the costs of quality programming, hiring and keeping talented employees, and investing in station facilities. Indeed, as NAB earlier showed, stations in smaller markets face challenges in generating revenue sufficient to cover their fixed costs.<sup>46</sup>

<b>2023 Radio Station Advertising Revenues by Market Rank</b>								
	<b>Nielsen Audio Market Size Ranges</b>							
<b>Column1</b>	<b>Markets 1-10</b>	<b>Markets 11-25</b>	<b>Markets 26-50</b>	<b>Markets 51-75</b>	<b>Markets 76-100</b>	<b>Markets 101-150</b>	<b>Markets 151-200</b>	<b>Markets 201-246</b>
Number of Commercial Stations	577	692	803	706	620	959	843	608
Average Rev. per Station (000s)	\$4,457	\$2,206	\$1,573	\$959	\$623	\$537	\$484	\$362
<i>Source: BIA Media Access Pro, May 2, 2024.</i>								

NAB reminds the Commission that local TV and radio stations are heavily or almost solely dependent on advertising revenues because they provide their OTA services free of charge to the public. Those revenues have substantially declined as broadcasters face unprecedented levels of competition for both audiences and advertisers from entities that are far larger and bear a fraction of the regulatory burdens.

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<sup>46</sup> BIA Advisory Services, *Local Radio Station Viability in the New Media Marketplace*, at 31-34 (Apr. 19, 2019), Attachment A to NAB Comments, MB Docket No. 18-349 (Apr. 29, 2019).



The market capitalization comparison above illustrates the absurdity of today's broadcast-only regulatory paradigm. The market caps of the technology giants, as well as the leading OTT and multichannel video/broadband providers, dwarf those of even the largest TV and radio station groups. Again, the Commission has yet to come to terms with the adverse role it plays in the marketplace by imposing strict structural ownership and other regulations only on broadcast station participants in the audio and video markets.

### III. THE FCC HAS FAILED TO REFORM ITS ASYMMETRIC BROADCAST REGULATORY REGIME TO REFLECT THE EFFECTS OF VASTLY INCREASED MARKETPLACE COMPETITION ON LOCAL STATIONS

Despite dramatic changes in the communications marketplace resulting in unprecedented competitive pressures on local radio and TV stations, the Commission has declined to reform its broadcast regulatory regime. Instead, the FCC recently has doubled-down on its harmful asymmetric regulation of broadcast stations to further disadvantage the only communications industry required to provide their products directly to the public through

local outlets for free. This regulatory approach will only further endanger the quality and even the viability of free OTA broadcasting services.

**A. The FCC Appears Intent On Increasing The Harm Caused By Asymmetric Regulation Of Free OTA Broadcasting**

Rather than addressing the competitive disadvantages its regulatory regime places on local radio and TV stations, the Commission has continued to increase the harmful asymmetry of its broadcast rules and policies. Most obviously, the FCC continues to disregard the need to reform its antiquated radio and TV ownership restrictions and allow broadcasters to achieve greater scale and compete on a somewhat more level playing field, both locally and nationally. As an initial matter, the Commission consistently fails to timely conduct its required quadrennial reviews of the broadcast ownership rules, as Congress directed in Section 202(h) of the 1996 Telecommunications Act (1996 Act).<sup>47</sup> Recently facing a court order to act on the egregiously delayed 2018 review,<sup>48</sup> the Commission determined not only to retain its vintage 1990s local ownership restrictions but also, with the urging of broadcasters' competitors in the pay TV industry, to *increase* restrictions on local TV stations, especially those in revenue-challenged smaller markets.<sup>49</sup>

In recent years, the FCC also has adopted suspect practices to reject proposed broadcast station transactions, including those for a single station, but in such a manner so as to avoid review by either the full Commission or a court, using Bureau-level designations

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<sup>47</sup> See NAB, Petition for Writ of Mandamus to the FCC, U.S. Court of Appeals for the D.C. Circuit, No. 23-1120 (Apr. 24, 2023).

<sup>48</sup> Order, No. 23-1120 (D.C. Cir. Sept. 28, 2023) (ordering FCC to show cause why mandamus petition should not be granted if it has not completed the 2018 quadrennial review within 90 days).

<sup>49</sup> See *2018 Quadrennial Regulatory Review*, Report and Order, MB Docket No. 18-349, FCC 23-117 (Dec. 26, 2023). NAB's and broadcasters' challenges to this order are pending before the Eighth Circuit Court of Appeals.

for hearing,<sup>50</sup> Bureau-level rewriting of the parties' proposed transaction by imposition of extensive conditions,<sup>51</sup> or simply refusing to address a proposed transaction until the parties' sales contract expired.<sup>52</sup> Such inappropriate actions wreak havoc with broadcasters' reasonable commercial expectations and, as discussed below, discourage investment in broadcasting and the financing of broadcast transactions.

Beyond refusing to permit broadcasters – and broadcasters alone – to reach a scale reasonable in today's marketplace, the Commission continues to impose paperwork and recordkeeping requirements creating “busy work” more than achieving important substantive goals. Indeed, the FCC at times has exceeded its statutory authority in its zeal to impose these burdens.

For example, the FCC adopted enhanced foreign sponsor identification requirements that increased burdens on all local broadcast stations leasing time,<sup>53</sup> when the problem cited – foreign propaganda from unidentified sources – was overwhelmingly with other platforms, including pay TV and primarily online/social media. After the D.C. Circuit Court of Appeals struck down a portion of those foreign sponsor ID requirements as beyond the FCC's

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<sup>50</sup> See *Consent to Transfer Control of Certain Subsidiaries of TEGNA Inc. to SGCI Holdings III LLC*, Hearing Designation Order, 38 FCC Rcd 1282 (Med. Bur. 2023).

<sup>51</sup> *Consent to Assign the License of WADL(TV)*, Memorandum Opinion and Order, DA 24-382 (Med. Bur. Apr. 23, 2024) (granting assignment of WADL, but subject to detailed conditions, and providing that, if the parties do not accept those conditions, their application would be designated for hearing); Office of Commissioner Brendan Carr, Statement on FCC's Denial of WADL-TV's Application (Apr. 23, 2024) (asserting that FCC has taken the parties' application and drafted a revised deal, which exceeds the FCC's authority).

<sup>52</sup> Harry Jessell, *FCC Nixes Another Deal With Deafening Silence*, TVNewsCheck (July 6, 2023) (discussing FCC killing the proposed sale of two small market TV stations by inaction).

<sup>53</sup> *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Report and Order, 36 FCC Rcd 7702 (2021).

authority to adopt,<sup>54</sup> the Commission returned with a new set of proposed foreign sponsorship rules still applicable to all broadcasters seeking to lease time, even to local churches, schools, or Main Street businesses, and that again stretched the bounds of the FCC's authority, raised greater First Amendment problems by requiring lengthy and highly legalistic certifications with required language, and imposed more extensive burdens, including on small and minority- and female-owned stations.<sup>55</sup> And then to make matters even worse, NAB understands that the foreign sponsor ID order soon to be released, for the first time and without any notice, will treat many political advertisements – but not advertisements for commercial goods and services – as covered leases of airtime, despite the unconstitutionality of such a content-based speech restriction unsupported by any evidence that any political advertisements on broadcast stations have ever been sponsored by a foreign governmental entity.<sup>56</sup> Again, the Commission seems determined to place asymmetric restrictions on local broadcast stations even for perceived problems on *non*-broadcast platforms – another example of the “we can regulate broadcasting so we must” mentality so harmful to radio and TV stations’ competitiveness.

The Commission also addresses important issues – such as assisting broadcast stations in emergencies or increasing the diversity of stations’ workforces – by imposing recordkeeping and reporting mandates that do little or nothing to promote its supposed goals. For example, the FCC recently proposed to require all broadcast stations to file reports

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<sup>54</sup> *NAB, et al. v. FCC*, 39 F.4th 817 (D.C. Cir. 2022).

<sup>55</sup> See *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Second Notice of Proposed Rulemaking, MB Docket No. 20-299, FCC 22-77 (Oct. 6, 2022); Comments of NAB and MMTC, MB Docket No. 20-299 (Jan. 9, 2023); NAB Notice of Ex Parte Communication, MB Docket No. 20-299 (Mar. 21, 2024).

<sup>56</sup> See NAB, Written Ex Parte Communication, MB Docket No. 20-299 (May 17, 2024).

in the Disaster Information Reporting System, when that system is activated.<sup>57</sup> Given that stations must cover disasters and emergencies as they unfold, NAB and others questioned the proposed requirements that would divert station staff (especially at small stations) toward completing FCC reporting obligations rather than focusing on providing critical news and information to the public in real time (or even keeping their stations on the air). Instead of adding more paperwork obligations, NAB and other broadcasters urged the FCC to focus on steps that would help stations, such as assisting broadcasters in gaining access to fuel, cellular service, and their facilities during a disaster, which in turn would help keep listeners and viewers informed.<sup>58</sup>

Similarly, the Commission remains wedded to forms and reports as its preferred but ineffective way of addressing broadcast employment-related issues,<sup>59</sup> although NAB repeatedly has asked the FCC to work with broadcasters on real-world efforts to promote minority and female recruitment and advancement in the industry.<sup>60</sup> It is instructive that the

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<sup>57</sup> Second Report and Order and Second Further Notice of Proposed Rulemaking, PS Docket Nos. 21-346, *et al.* (Jan. 26, 2024).

<sup>58</sup> Comments of NAB, PS Docket Nos. 21-346, *et al.* (May 13, 2024).

<sup>59</sup> See *Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies*, MB Docket No. 98-204, Fourth Report and Order and Order on Reconsideration, FCC 24-18 (Feb. 22, 2024) (reinstating FCC Form 395-B, which collects workforce composition data). Several parties have challenged this order in court. See *Nat'l Religious Broadcasters and American Family Ass'n v. FCC*, Petition for Review (5th Cir. May 3, 2024); *Texas Ass'n of Broadcasters v. FCC*, Petition for Review (5th Cir. May 9, 2024). NAB did not oppose reinstatement of Form 395-B but observed that the form would likely only increase paperwork burdens without offering corresponding value. Earlier this week, we filed a narrow petition asking the FCC to reconsider the portion of its order determining to make Form 395-B data public on a station-specific-basis. Petition for Reconsideration of NAB, MB Docket No. 98-204 (June 3, 2024).

<sup>60</sup> As NAB has pointed out, there is no evidence that existing EEO requirements or reporting obligations have enhanced diversity in the broadcast workplace or that increasing those requirements would do so either. But NAB's suggestions for the FCC to take pro-active, concrete steps that could actually increase employment diversity have been ignored. See,

FCC’s time-consuming and paperwork-intensive EEO audits of thousands of broadcast stations from 2003 to 2019 resulted in, to NAB’s knowledge, fewer than 20 Notices of Apparent Liability or Admonishments, and the most common violations concerned recordkeeping and documentation-related mistakes. None involved a finding a discrimination.<sup>61</sup> Yet the Commission insists on conducting these inefficient and costly audits, which are particularly burdensome for smaller and noncommercial stations. The Commission more recently erroneously equated a station’s (self-reported) failure to timely upload its completed annual EEO report to its public file – which generated no public complaints and created no consumer harm – with the failure to perform a substantive obligation, which is factually and legally suspect.<sup>62</sup> This prosecutorial mindset has turned the public file into a serious and unwarranted compliance risk for stations, rather than just a personnel and resource burden. Indeed, the FCC’s aggressive enforcement practices overall have led to calls for reforming the Enforcement Bureau.<sup>63</sup>

At today’s public meeting, the Commission addressed a burning issue confronting the broadcast industry in a media and advertising market dominated by the “Big Tech” platforms

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e.g., Comments of NAB, MB Docket No. 98-204, at 2-3, 5-10 (Sept. 30, 2021); Comments of NAB, MB Docket No. 19-177, at 3-4, 11-14 (Sept. 20, 2019) (suggesting FCC engagement in industry programs to expand minority participation in newsrooms and station management; producing an FCC guide to EEO best practices highlighting examples of successful EEO initiatives; and fostering connections between broadcasters and potential job applicants).

<sup>61</sup> Comments of NAB, MB Docket No. 19-177, at 7-10 (Sept. 20, 2019) (describing the substantial amounts of information and documentation that stations must assemble and the required staff and/or outside counsel time for EEO audits, all for very dubious benefits).

<sup>62</sup> See Comments of NAB, *In the Matter of Cumulus Licensing LLC*, File No.: EB-IHD-20-00031223 (Mar. 28, 2022) (explaining that the FCC could not justifiably conclude that a station had violated its substantive obligation to analyze its EEO program merely from a delay in uploading a completed EEO report due to staff turnover).

<sup>63</sup> See Thomas M. Johnson, Jr., *White Paper on FCC Enforcement Bureau Reform*, Wiley (Jan. 29, 2024).

and giant broadband providers – whether to significantly increase the recordkeeping burdens and compliance risks of low power TV (LPTV) stations. Despite their secondary status, limited coverage areas, restricted power and lesser resources, the FCC now proposes to require many LPTV stations to comply with the same online public file requirements applicable to full power and Class A TV stations.<sup>64</sup> And for what purpose? Apparently so the American public can ignore those stations’ online public files, just as they ignore the public files of full power and Class A stations. A Freedom of Information Act request revealed that only .060 percent of the estimated U.S. population viewed broadcast stations’ online public files in 2021 – even counting the views by broadcasters and related personnel (station staff, counsel, etc.).<sup>65</sup>

The Commission also has not meaningfully addressed the damage that asymmetric regulation, including restrictive ownership rules, causes to the viability of local broadcast journalism in today’s Big Tech-dominated marketplace. NAB has previously explained how the tech giants’ dominance of both digital advertising and online content discovery places local

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<sup>64</sup> *Political File and Online Public File Requirements for Low Power Television Stations*, Notice of Proposed Rulemaking, MB Docket No. 24-147, FCC-CIRC2406-04 (May 16, 2024).

<sup>65</sup> According to the FCC’s response to a 2022 NAB FOIA request, in 2021 the FCC Public Inspection File website as a whole had only 199,431 unique views (and just 248,032 total views). Letter from Sima Nilsson, Media Bureau, FCC to Patrick McFadden, NAB, FOIA Control No. 2022-000374 (Apr. 28, 2022). That averages merely 11.38 unique views per station in an entire year. See FCC, *Broadcast Station Totals as of Dec. 31, 2021*, Public Notice, DA 22-2 (Jan. 4, 2022) (reporting a total of 17,529 full power AM, FM and TV commercial and noncommercial stations and Class A TV stations, which are the types of stations required to maintain online public files). But even this limited number of views per station cannot reasonably be attributed to members of the public because stations themselves (and their attorneys) view their own (and their clients’) online public files to check for completeness and accuracy and to ensure that materials were successfully uploaded. NAB further assumes that these modest numbers of views also included views by FCC staff. Moreover, even overestimating (likely substantially) the number of views by the general public, that still would mean only .060 percent of the estimated U.S. population viewed broadcast stations’ online public files in 2021. See <https://www.census.gov/popclock/> (estimating U.S. population to be 332,048,977, as of July 1, 2021) (visited May 22, 2024).

stations and their news operations under increasing duress.<sup>66</sup> Unrefuted studies submitted to the FCC have found that TV broadcasting generally, and local news production specifically, are “subject to strong economies of both scale and scope,” which are, by definition, “associated with falling unit costs of production” and “hence are *prima facie* welfare enhancing.”<sup>67</sup> As a result, placing undue limits on broadcasters’ ability to achieve scale economies “result[s] in higher costs, lower revenues, reduced returns on invested capital [and] lower output,” including “significantly reduc[ed]” local news output.<sup>68</sup> But rather than address the role its rules play in inhibiting broadcasters from achieving important economies of scale that promote increased local news output, the FCC’s response has been to propose priority processing of some broadcast applications if those stations certify they provide locally originated programming.<sup>69</sup> This action is akin to fiddling while Rome burns or rearranging the deck chairs on the Titanic – pick your own (overused) metaphor. In any event, the FCC’s prioritization proposal will do nothing to incentivize broadcasters to provide more local journalism or generate other locally originated programming because it fails to grasp the

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<sup>66</sup> See, e.g., 2022 Competition Comments, at 51-58 and Attachment G, BIA Advisory Services, *Economic Impact of Big Tech Platforms on the Viability of Local Broadcast News* (May 2021).

<sup>67</sup> J.A. Eisenach and K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 1-2 (2011) (Economies of Scale Study), attached to Reply Comments of NAB, MB Docket No. 10-71 (June 27, 2011); accord Decl. of M. Israel and A. Shampine, Comments of NAB, MB Docket No. 10-71, at Appendix B ¶¶ 49-51 (June 26, 2014) (finding that economies of scale and scope exist in TV broadcasting and that both lead to “increased investment in news programming”).

<sup>68</sup> Economies of Scale Study at 2-3. Similar scale economies exist in radio broadcasting. See BIA Advisory Services, *Local Radio Station Viability in the New Media Marketplace*, at 26-33 (Apr. 19, 2019), Attachment A to Comments of NAB, MB Docket No. 18-349 (Apr. 29, 2019).

<sup>69</sup> *Priority Application Review for Broadcast Stations that Provide Local Journalism or Other Locally Originated Programming*, Notice of Proposed Rulemaking, MB Docket No. 24-14, FCC 24-1 (Jan. 17, 2024).

fundamental economic and competitive realities underpinning broadcasters' programming decisions.<sup>70</sup>

Finally, in adopting additional regulations in recent years, the Commission has not considered the cumulative financial and competitive toll all its rules, both new and old, take on local stations in today's audio and video markets (and seems to regret earlier deregulatory efforts, even minor ones).<sup>71</sup> No regulation is costless, and multiple regulations impose significant burdens on the scarce resources of local stations, especially those earning lower levels of ad revenues, those located in smaller markets, and those with small staffs.<sup>72</sup> Indeed, under the FCC's asymmetric regulatory fee structure, radio and TV stations have paid approximately \$286,654,165 in fees from 2019-2023, while their digital competitors – entities vastly larger than broadcast stations or groups – paid nothing. And the Commission only keeps proposing more asymmetric regulations that may well produce outcomes contrary to its intention. The new proposal to regulate use of AI in political speech (both candidate and

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<sup>70</sup> Reply Comments of NAB, MB Docket No. 24-14, at 2 (Apr. 8, 2024).

<sup>71</sup> For example, the FCC appears poised to reinstate a previously repealed (and rather obscure) rule applicable to FM stations. See *Amendment of Section 73.3556 of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations*, Order on Reconsideration, MB Docket No. 19-310 (listed as item on circulation as of May 31, 2024). The FCC also recently expressed such regret about its previous repeal of the broadcast main studio rule in a rulemaking notice on a *different* topic that it led commissioners to dissent. *Priority Application Review for Broadcast Stations that Provide Local Journalism or Other Locally Originated Programming*, Notice of Proposed Rulemaking, MB Docket No. 24-14, FCC 24-1 (Jan. 17, 2024), Dissenting Statements of Commissioner Brendan Carr and Commissioner Nathan Simington.

<sup>72</sup> See, e.g., Section II., *supra*, demonstrating that TV and radio stations in mid-sized and small markets earn only a fraction of the ad revenues of stations in the largest markets; NAB Notice of Ex Parte Communication, MB Docket No. 20-299, at 3 (Mar. 21, 2024) (pointing out the aggregate burdens the FCC's rules and recordkeeping/reporting requirements place on local stations and how difficult it can be for broadcasters, especially small ones, to comply, given their limited number of employees who may divide their time amongst multiple stations and/or who may serve in different capacities at stations).

issue ads) aired on broadcast stations<sup>73</sup> will not only asymmetrically burden local stations but also will likely divert more political speech from already-regulated broadcast outlets to unregulated online platforms where misinformation and disinformation freely reign. Given the cumulative effect of all these and other old and new regulations, the upcoming report to Congress should evaluate how they erode the competitiveness of free OTA broadcasting in today's marketplace.

#### **B. The FCC's Regulatory Regime Discourages Investment And New Entry In The Broadcast Industry**

As NAB has pointed out before, the FCC's regulatory regime – especially its analog-era ownership restrictions – not only prevent broadcasters from achieving competitively necessary scale but also hamstring investment by making broadcasting less attractive to investors than their competitors in the communications industry.<sup>74</sup> The idea that the asymmetric regulation of one industry vis-à-vis other competing industries impedes investment in the more regulated industry is hardly new. It is textbook economics that barriers to entry, which include cost advantages held by some market participants over others, can diminish incentives to enter or invest.<sup>75</sup> That reduction in investment capital limits the broadcast industry's ability to compete by providing attractive programming (which is increasingly expensive to acquire or produce), to hire and retain talent, and to pay for technological advances, such as the deployment of Next Gen TV. And these limitations all, in

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<sup>73</sup> *Chairwoman Rosenworcel Unveils First Step in New AI Transparency Effort to Disclose AI-Generated Content in Political Ads on TV and Radio*, News Release (May 22, 2024).

<sup>74</sup> Comments of NAB, MB Docket No. 18-349, at 15-19 (Sept. 2, 2021).

<sup>75</sup> Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 79 (4th Ed. 2005) (observing that “[a]n absolute cost advantage allows an incumbent firm to earn excess profits without fear of new firms entering the market.”).

turn, impede stations' ability to attract and to retain audiences – and thus advertisers – in a competitive video and audio market.

Economic literature showcases the litany of harms that undue regulation can inflict on an industry. Empirical work has shown that asymmetric regulation can undermine innovation<sup>76</sup> and suppress investment.<sup>77</sup> As NAB highlighted in previous comments, studies have shown that retaining asymmetric regulations in the face of new competition creates regulatory distortions, drives up the regulated industry's costs, causes already scarce capital to flow to less regulated industries, deters new firm entry, and disadvantages the heavily regulated firms in relation to competitors that face fewer regulations.<sup>78</sup> On the other hand,

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<sup>76</sup> E.g., Philippe Aghion, Antonin Bergeaud & John Van Reenen, *The Impact of Regulation on Innovation*, 113 (11) Am. Econ. Rev. 2894 (2023) (finding that significant increases in labor regulations resulted in sharp drops in innovation and discouraged incremental innovation after demand shocks).

<sup>77</sup> E.g., Thomas W. Hazlett & Anil Caskan, *Natural Experiments in U.S. Broadband Regulation*, 7(4) Rev. of Network Econ. 460 (Dec. 2008).

<sup>78</sup> See Comments NAB, MB Docket No. 18-349, at 15-19 (Sept. 2, 2021); see also Steve Pociask and Joseph P. Fuhr, Jr., *Concentration by Regulation: How the FCC's Imposition of Asymmetric Regulations Are Hindering Wireline Broadband Competition in America*, The American Consumer Institute Center for Citizen Research, at 2 (Jan. 2016) (demonstrating that asymmetric regulations on incumbent telecommunications service providers providing broadband services “affects broadband competition, reduces broadband investment, increases wireline concentration and reduces consumer choice”); George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center Perspectives (Apr. 25, 2017) (showing that the threat of Title II reclassification reduced investment in broadband by at least 20 percent between 2011 and 2015); Ev Ehrlich, *A Brief History of Internet Regulation*, Progressive Policy Institute, at 16-17 (Mar. 2014) (examining the impact of uneconomic broadband regulations imposed on incumbent services compared to less regulated systems and observing that “investment goes where regulation guides it by making it either welcome or unwelcome,” with such regulations having the ability to “throttle the flow of capital into the sector and are therefore implemented at a potentially great cost” to overall investment in the broadband sector); Rob Frieden, *Regulatory Opportunism in Telecommunications: The Uneven Competitive Playing Fields*, 10 CommLaw Conspectus 81 (2001) (describing how “[a]symmetries in regulatory burdens create incentives to find ways to exploit artificial competitive advantages and avoid regulatory classifications that create a bias toward more pervasive and costly regulatory burdens” and have “the potential to tilt the

reforms that reduce regulatory-related entry barriers have been shown to stimulate capital accumulation<sup>79</sup> and customer acquisition.<sup>80</sup>

Regulation that generates uncertainty in an industry also can impede entry,<sup>81</sup> and as demonstrated in other contexts, laws or regulations that suppress mergers and acquisitions will create uncertainty around an investor's ability to freely exit after spending to grow and develop a business.<sup>82</sup> And such uncertainty around the prospect for mergers and acquisition activity can undermine incentives to invest in the first place. The FCC's ownership rules, along with its failure to conduct its quadrennial reviews in a timely manner, continue to create considerable uncertainty. For instance, the FCC's 2018 quadrennial review order sows uncertainty around (among other issues) when the Commission would approve of the transfer or assignment of a station that, through organic growth, has the programming for two top-four

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competitive playing field in favor of one class of telecommunications carriers or service providers"); James Bailey and Diana Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment*, 52 J. of Regulatory Econ. 237 (2017) (finding that more regulated industries experience fewer new firm births and slower employment growth and that small firms are more likely to leave a heavily regulated industry).

<sup>79</sup> Alberto Alesina, Silvia Ardagna, Giuseppe Nicoletti & Fabio Schiantarelli, 3(4) *Regulation and Investment*, J. of the European Econ. Ass'n 791 (June 2005) (finding that deregulation can spur entry and investment).

<sup>80</sup> Thomas W. Hazlett & Anil Caskan, *Natural Experiments in U.S. Broadband Regulation*, 7(4) Rev. of Network Econ. 460 (Dec. 2008) (finding that DSL deregulation led to a significant increase in the number of subscribers).

<sup>81</sup> Avinash K. Dixit & Robert S. Pindyck, *Investment Under Uncertainty* 345 (1994) (noting that regulatory uncertainties can make costs unpredictable, which can deter entry).

<sup>82</sup> Gordon M. Phillips & Alexei Zhdanov, *Venture Capital Investments, Merger Activity, and Competition Laws around the World*, 13(2) Rev. of Corp. Finance Studies 303 (2024) (finding the creation of pro-takeover laws spurring greater venture capital activity as compared to jurisdictions that have stricter antitakeover laws); see also Xiaohui Gao, Jay R. Ritter & Zhongyan Zhu, *Where Have All the IPOs Gone?*, 48(6) J. of Finance & Quantitative Analysis 1663 (Dec. 2013) (finding that many firms sell to larger corporations to gain the benefits of faster "speed to market" and greater economies of scope).

affiliations airing on its primary channel and on a multicast stream.<sup>83</sup> And as described above, the Commission's use of suspect practices to effectively kill proposed broadcast transactions – including those requiring no waivers of FCC rules – in ways that cut off any avenues of appeal greatly increase uncertainty, significantly discourage investment, and substantially impede secondary market transactions in the broadcast industry. Tellingly, among broadcast stations, deal volume has fallen precipitously from \$4.72 billion in 2021 to \$959.5 million in 2022 and \$578.4 million in 2023.<sup>84</sup>

A review of recent auction activity further exemplifies the waning environment for new investment and entry into the broadcast industry:

- **Full-Power Television.** In the most recent auction to construct full-power television stations, approximately one-third of construction permits (CPs) remained unpurchased.<sup>85</sup>
- **AM and FM Radio.** In the most recent auction for AM and FM radio CPs, 30.2 percent of the CPs offered for auction remained unpurchased.<sup>86</sup> And in the five full-power FM

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<sup>83</sup> Scott R. Flick & Jessica T. Nyman, *FCC 2018 Quadrennial Order Largely Maintains Status Quo, But Local Television Ownership Rule Modifications Create New Uncertainty*, CommLawCenter (Dec. 28, 2023), <https://www.commlawcenter.com/2023/12/fcc-2018-quadrennial-order-largely-maintains-status-quo-but-local-television-ownership-rule-modifications-create-new-uncertainty.html>.

<sup>84</sup> S&P Global Market Intelligence, *Broadcast outlook 2024: Challenges, opportunities facing US TV, radio stations* (Feb. 24, 2024), <https://www.spglobal.com/marketintelligence/en/news-insights/research/broadcast-outlook-2024-challenges-opportunities-facing-us-tv-radio-stations>. Although overall global deal volume is down by half from approximately \$5 trillion in 2021 to \$2.5 trillion in 2023, deal volume is down over 85 percent among broadcast stations over the same period.

<sup>85</sup> Auction 112 offered 27 full-power television construction permits, but the winning bidders only acquired 18 licenses. See *Auction of Construction Permits for Full Power Television Stations; Status of Short-Form Applications to Participate in Auction 112*, Public Notice, AU Docket No. 21-449, DA-22-659 (Apr. 25, 2022); FCC, *Public Notice, Auction of Construction Permits for Full Power Television Stations Closes; Winning Bidders Announced for Auction 112*, AU Docket No. 21-449, DA-22-659 (June 23, 2022).

<sup>86</sup> Auction 109 offered four AM construction permits and 135 FM construction permits, but the winning bidders acquired only 97 CPs. See *Auction of AM and FM Broadcast Construction Permits*, Public Notice, AU Docket No. 21-39, DA 21-780 (July 1, 2021); FCC, *Public Notice,*

auctions before this most recent auction, nearly one-quarter of the CPs offered at auction remained unsold.<sup>87</sup>

This excess capacity of CPs reveals tepid interest in new entry and investment in the broadcast industry, tamped down by the inability of the most likely investors and prospective owners – existing broadcasters – to acquire stations. A leading broadcast broker and station owner plainly explained this point in a declaration submitted to the Commission in 2021.<sup>88</sup> He stated that, for the first time in his experience, there are simply no buyers for many radio stations, especially in mid-sized and small markets, other than an existing owner in those same markets “who may not be allowed to purchase” the stations due to current FCC ownership restrictions. He attested that, in dozens of markets, owners “feel trapped” and cannot sell their stations “because the logical and best buyer[s]” are prohibited from purchasing them.<sup>89</sup>

Preventing the “logical and best buyers” from acquiring broadcast stations causes clear public interest harm. As Commissioner Carr has written, on a visit to Wyoming he observed a local radio station in Powell that was “effectively a Dell laptop playing music pumped in” from somewhere else.<sup>90</sup> A local broadcaster in neighboring Cody, who operated stations airing local news and entertainment programming attuned to the needs of listeners,

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*Auction of AM and FM Broadcast Construction Permits Closes*, AU Docket No. 21-39, DA 21-983 (Aug. 12, 2021).

<sup>87</sup> See Reply Comments of National Association of Broadcasters, GN Docket No. 20-60, at n. 67 (May 28, 2020) (noting that in the “last five auctions of frequencies for full-power FM stations combined, the FCC retained 147 unsold construction permits, or nearly one-quarter (23.4 percent) of the total number of permits offered in those auctions”).

<sup>88</sup> Exh. C, Decl. of W. Lawrence Patrick, Joint Comments of Connoisseur Media *et al.*, MB 18-349 (Sept. 2, 2021).

<sup>89</sup> *Id.* at ¶¶ 5, 8-10.

<sup>90</sup> *2018 Quadrennial Regulatory Review*, Report and Order, MB Docket No. 18-349, FCC 23-117 (Dec. 26, 2023), Dissenting Statement of Commissioner Brendan Carr.

wanted to buy the Powell station and originate live and local programming but could not do so. According to the Commissioner, the FCC's ownership rules are "keeping that laptop powered up while preventing actual investment" in local broadcasting, including newsgathering, in Wyoming,<sup>91</sup> and inflicting similar harms to localism and competition by impeding investment in and improvement of local stations and their services in markets across the country.

These asymmetric ownership and other regulations adversely affect all radio and TV broadcast owners and investors, but disproportionately harm small broadcasters and potential new entrants, including women and minorities that especially struggle to obtain investment capital. The Commission has recognized since at least the Carter Administration that the "principal barrier to minority ownership is the availability of funding" and concluded that "minorities must gain access to capital markets or else they will continue to remain underrepresented among the ranks of station owners."<sup>92</sup> Throughout subsequent decades the FCC consistently reaffirmed this conclusion.<sup>93</sup> Congress and other federal agencies, as well as minority and female broadcasters, also have acknowledged that women- and minority-

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<sup>91</sup> *Id.*

<sup>92</sup> FCC, *Minority Ownership in Broadcasting*, Minority Ownership Taskforce Report, at 11-12 (May 17, 1978).

<sup>93</sup> See, e.g., Report and Order, 100 FCC 2d 17, 48-49 (1984); *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Notice of Proposed Rulemaking, 10 FCC Rcd 2788, 2790 (1995); *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd 16802, 16920 (1997); *Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act*, Declaratory Ruling, 28 FCC Rcd 16244, 16249, 16255, 16257-58 (2013); *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Report and Order, 33 FCC Rcd 7911, 7915 (2018).

owned businesses face special obstacles in accessing capital.<sup>94</sup> Notably, in 2013, 31 minority and civil rights organizations requested an easing of restrictions on foreign investment in broadcasting, stating that U.S. banks and venture firms that formerly financed small and medium-sized broadcast transactions had “left the space entirely,” which industry analysts have echoed.<sup>95</sup> Yet despite the Commission recognizing the problem and repeatedly claiming it cares deeply about promoting minority and female ownership, last year on the precipice of one of the largest infusions of capital into the broadcasting business by a minority owner in history, the Media Bureau rejected the proposed Standard General-TEGNA transaction via a non-reviewable hearing designation order.<sup>96</sup> In one fell swoop, the FCC managed to increase uncertainty for broadcasters and their investors, further discourage future broadcast investment and financing for station transactions, and prevent a massive increase in the number of minority-owned and female-managed TV stations in the country.

Today, industry and financial analysts continue to stress the enormous investment headwinds facing the broadcast industry, particularly with rapidly increasing advertising

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<sup>94</sup> See, e.g., Comments of NAB, MB Docket No. 18-349, at 11-14 (Sept. 2, 2021) (citing congressional enactments, hearings, and reports and several federal agency reports, as well as the comments of numerous female and minority broadcasters in FCC proceedings).

<sup>95</sup> Letter from David Honig, President, MMTTC, MB Docket No. 13-50 (Apr. 15, 2013); see Letter from G. Johnson, BIA Capital Strategies, and T. Buono and M. Fratrik, BIA Advisory Services, to Marlene Dortch, FCC, MB Docket No. 17-289, at 1-2 (June 11, 2018) (stating that the number of lenders to the broadcast industry has “declined significantly over the past decade”; that funding challenges are “accentuated in medium and small markets”; that it is “difficult for even established broadcast owners, especially radio, to raise equity and debt financing in this competitive environment”; and that “[f]irst-time owners face daunting, if not nearly insurmountable, odds in obtaining financing”).

<sup>96</sup> *Consent to Transfer Control of Certain Subsidiaries of TEGNA Inc. to SGCI Holdings III LLC*, Hearing Designation Order, 38 FCC Rcd 1282 (Med. Bur. 2023).

competition from streaming services and social media.<sup>97</sup> The FCC's regulatory regime only exacerbates these problems. Because asymmetric regulations, including ones forcing broadcasters into uneconomic ownership arrangements, artificially depress (or at the very least flatten) the value of stations, investors have even less incentive to provide capital to the broadcast industry, and instead prefer to invest in other industries with increasing values, making it more difficult for existing and prospective broadcasters to obtain capital. Women and minorities who usually struggle to access capital are even more challenged to obtain adequate financing in this environment.<sup>98</sup> This year's competition report to Congress finally must recognize that the FCC's regulatory regime is choking off investment in the radio and TV industries and, thus, in the public's free OTA broadcast services.

### **C. Broadcasters Experience Regulatory Speed Bumps On The Path To Innovation That Do Not Impede Other Services**

As NAB has previously explained, broadcasters face regulatory obstacles to innovation that do not confront their competitors.<sup>99</sup> For example, when TV broadcasters sought to

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<sup>97</sup> Moody's Investor Service, *Record US Political ad spend insufficient to save TV broadcasters from looming threats* at 2 (Apr. 2, 2024); see also BIA Advisory Services, *Economic Impact of Big Tech Platforms on the Viability of Local Broadcast News* (May 2021), Attachment G to 2022 Competition Comments.

<sup>98</sup> As explained in earlier proceedings, ownership restrictions (1) reduce the asset and net worth values of station owners (including minorities and women), harming their ability to borrow against their assets to finance growth; (2) artificially depress the value of stations, thereby disproportionately increasing the ability of white male investors, who generally have greater access to capital than women and minorities, to acquire stations; and (3) reduce the long-term attractiveness of broadcasting relative to other investment opportunities. See, e.g., Reply Comments of the Center for Regulatory Effectiveness, MB Docket No. 06-121, *et al.*, at 2-3 (Oct. 25, 2007); Reply Comments of NAB, GN Docket No. 22-203, at 29-32 (Aug. 1, 2022). In previously rejecting arguments opposing ownership rule reform on the ground it would lead to higher stations prices, thereby disadvantaging minority new entrants, the FCC stated that its ownership rules were not intended to "artificially deflat[e] the prices of stations" and concluded it would be "inappropriate" to retain or adopt ownership rules "to deflate market prices artificially." Report and Order, 100 FCC 2d 17, 48-49 (1984).

<sup>99</sup> See, e.g., 2022 Competition Comments at 59-62.

upgrade their transmission standard to ATSC 3.0, which integrates seamlessly with internet protocol, enhances spectrum efficiency, and allows broadcasters to enhance services, they had to seek FCC permission and waited a year and a half to obtain approval to invest millions of their own dollars in their own facilities to improve a service offered free to the public.<sup>100</sup>

Other participants in the communications marketplace do not face similar regulatory speedbumps on the road to innovation, including the massive tech platforms and even other FCC licensees. Wireless carriers, for example, move from one generation of technology to the next on their own terms and on their own schedule. Not only does the FCC not require them to seek permission to do so, but the Commission also actively seeks to make additional spectrum available for those carriers to facilitate their deployment of new technologies.<sup>101</sup> Similarly, the FCC regularly seeks to make additional spectrum available for unlicensed services, which carry no public service obligations whatsoever, to encourage innovation and the deployment of new services.<sup>102</sup> In contrast, broadcasters can face years-long regulatory processes when seeking permission to offer new services using the spectrum already licensed to them.<sup>103</sup>

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<sup>100</sup> *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930 (2017).

<sup>101</sup> See, e.g., *Expanding Flexible Use in the 3.7-4.2 GHz Band*, Report and Order, 35 FCC Rcd 2343 (2020) (making 280 MHz of spectrum available for 5G services).

<sup>102</sup> See, e.g., *Unlicensed Use of the 6 GHz Band*, Report and Order and Further Notice of Proposed Rulemaking, 35 FCC Rcd 3852 (2020) (making 1200 MHz of spectrum available for Wi-Fi and other unlicensed uses).

<sup>103</sup> NAB earlier described the decades-long saga of persuading the FCC to open a proceeding to advance the development of terrestrial Digital Audio Broadcasting (DAB), to select in-band, on-channel (IBOC) as the technology to permit AM and FM radio broadcasters to introduce digital operations, and to adopt final operational requirements and related broadcast licensing and service rule changes. See 2022 Competition Comments at 60.

NAB also observes that technological innovations in broadcasting – including those allowing local stations to expand and improve their services to the public – inevitably result in calls to increase stations’ regulatory burdens. For example, after approving broadcasters’ use of ATSC 3.0 as serving the public interest, the Commission nonetheless continued to ask whether that approval should lead to the attachment of additional regulatory strings. The FCC has repeatedly sought comment on the (supposed) implications of broadcasters’ voluntary decisions to deploy ATSC 3.0 for evaluating changes to the local and national TV ownership rules.<sup>104</sup> Again, the Commission does not consider whether or how to impose further regulatory requirements on other industries as they embrace technological advances. The FCC, for instance, has not revisited its mobile spectrum holdings policies merely because wireless carriers have shifted from 3G to 4G and now to 5G. When wireless carriers “refarm” spectrum to pave the way for the next generation of wireless deployments, forcing consumers to bear the costs of replacing their own devices, the Commission assists carriers by issuing fact sheets, rather than imposing additional requirements on them.<sup>105</sup> Similarly, although faster mobile broadband speeds inevitably lead to higher monthly wireless bills, the Commission does not use increased consumer costs as a reason to restrict wireless operators’ 5G deployments.<sup>106</sup>

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<sup>104</sup> See FCC, *Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, Public Notice, at 4, MB Docket No. 18-349, DA 21-657 (June 4, 2021); *2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 33 FCC Rcd 12111, 12138 (2018); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd 10785, 10796 (2017).

<sup>105</sup> See e.g., FCC, *Plan Ahead for the Phase Out of 3G Cellular Networks and Service*, <https://www.fcc.gov/consumers/guides/plan-ahead-phase-out-3g-cellular-networks-and-service>.

<sup>106</sup> See, e.g., E. Blumenthal, *Verizon Price Increase: Why Your Phone Bill Might Be Higher in March*, cnet.com (Feb. 21, 2024) (reporting that Verizon will be increasing the costs of 5G Get More, 5G Play More, 5G Do More, and 5G Start mobile plans in March 2024); J. Hindy,

The FCC's reflexive urge to couple broadcast innovation with additional regulatory obligations is not new. During the DTV transition, for example, the Commission inquired about a remarkably wide range of potential new public interest requirements for TV broadcasters simply due to the congressionally-mandated switch to digital technology – which ultimately cost broadcasters millions of dollars per station and resulted in the return of previously allocated TV spectrum to the FCC.<sup>107</sup>

NAB continues to believe that TV and radio broadcasters' efforts to enhance their ability to serve viewers through technological innovation (especially when doing so within the same spectrum footprint) offer no justification for retaining outdated, asymmetric restrictions, let alone for increasing regulatory burdens on the broadcast industry. There is no rational basis for viewing improvements in technology as an excuse for regulation; indeed, doing so would be a perverse disincentive for broadcaster adoption of new technologies and would not serve the public interest. Instead, the Commission should acknowledge that broadcasters often need to make significant capital investments to adopt new technologies and should prioritize promoting broadcast innovations with the potential to improve the

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*Verizon Joins AT&T in Raising Rates for Unlimited, 5G Plans*, pcmag.com (Jan. 25, 2024) (reporting on Verizon's impending \$4-per-month per-line rate hike); A. Ilumba, *How Much is the Average American's Cell Phone Bill?*, whistleout.com (Feb. 21, 2024) (according to the Bureau of Labor Statistics, mobile phone rates increased steadily between 2013 and 2020, with an average year-over-year increase of 4.7%).

<sup>107</sup> See *Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633 (1999) (seeking comment on requirements relating to multicasting, the TV ratings system, ancillary and supplementary services, information disclosures, EAS, mandatory minimum public interest obligations, improving access to broadcast programming for people with disabilities, diversity, and enhancing political discourse). While Commissioners and others wondered "why the mere use of a digital medium rather than an analog one justifies new public interest obligations," *id.* at 21658 (Comm. Powell concurring, emphasis in original), the FCC made similar proposals when seeking comment on programming and operational rules for radio stations that might voluntarily choose to utilize DAB. Further Notice of Proposed Rulemaking and Notice of Inquiry, 19 FCC Rcd 7505, 7517-19 (2004).

public's TV and radio services. Unfortunately, the FCC still appears to greet innovation in broadcasting much less enthusiastically than innovation in wireless and other industries.<sup>108</sup>

In this regard, broadcasters are trying to move forward expeditiously to deploy ATSC 3.0 service. As of this writing, broadcasters have launched ATSC 3.0 in 77 markets covering more than 75 percent of the U.S. population, with additional markets scheduled for later this year.<sup>109</sup> More than 11 million TV sets with ATSC 3.0 receivers already have been sold in the U.S., and the industry expects sales of compatible sets to continue to accelerate in the near term.<sup>110</sup> Broadcasters are beginning to deliver some of the advanced picture and sound quality that Next Gen TV enables.<sup>111</sup> Getting to this point has required a number of leaps of faith – broadcasters have invested enormous sums to upgrade their facilities before either receivers or content was available; television manufacturers built capabilities into products starting before the first Next Gen stations were on the air, several years before those stations could begin offering a meaningfully differentiated product.

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<sup>108</sup> Apparently the FCC's idea of promoting radio innovation was to authorize FM boosters to originate programming for up to three minutes per hour, which will primarily if not solely benefit GBS, a non-broadcast company with proprietary technology for enabling the geotargeting of radio programming. See Report and Order and Further Notice of Proposed Rulemaking, MB Docket Nos. 20-401, 17-105, RM-11854 (Apr. 2, 2024). The broadcast industry overall opposed GBS' proposal. In the meantime, the FCC continues to sit on requests from NAB and Xperi to authorize asymmetric sidebands and an increase in FM digital power so that radio broadcasters can increase coverage and serve more listeners. See NAB, Xperi Corp., and Nat'l Public Radio, Petition for Rulemaking, RM-11851 (Dec. 9, 2019); NAB and Xperi, Inc., Petition for Rulemaking, MB Docket No. 22-405 (Oct. 26, 2022).

<sup>109</sup> <https://www.watchnextgentv.com/markets/>

<sup>110</sup> <https://pearl.tv.com/news/nextgen-tv-expanding-to-include-brilliant-high-dynamic-range-enhanced-audio-and-innovative-applications-to-enhance-viewing-choices-music-gaming-and-on-screen-commerce-delivered-by-local-broadcast/>

<sup>111</sup> <https://tvnewscheck.com/tech/article/gray-television-rolling-out-advanced-features-with-nextgen-tv/>

When APTS, AWARN, CTA, and NAB first petitioned<sup>112</sup> the FCC to allow the voluntary deployment of this revolutionary standard, 4K content was quite new and primarily consisted of cinematic content. In the intervening eight years, however, 4K content has become increasingly prevalent, including live sports, a staple of local broadcast television. In 2024, the Super Bowl was available in 4K on streaming platforms and some MVPDs, but broadcast television viewers could only receive the game in high definition.<sup>113</sup> While broadcasters are able to offer HDR content today, the extreme spectrum constraints broadcasters experience due to FCC-mandated dual transmission prevent 4K from becoming a reality. The Commission needs to act now to facilitate a faster ATSC 3.0 transition so that TV broadcasters can catch up to other marketplace competitors and offer enhanced services to consumers. The FCC's 2023 announcement of a public-private initiative led by NAB to identify a roadmap for the orderly transition of ATSC 1.0 to ATSC 3.0, known as the Future of TV Initiative, was a positive step in this direction but the Commission must do more to expedite the process.

While other participants in the video marketplace can rapidly adopt new technologies, broadcasters are being held to standards no other industry faces to avoid even temporary or minor disruptions. Before a broadcaster can add Next Gen television services to a market, it must negotiate with its local TV station competitors to arrange for hosting of its programming in ATSC 1.0 and submit the plan to FCC staff for approval. If the hosting plan does not meet the FCC's stringent standards for expedited processing, which is impossible in many markets, the launch of Next Gen service is subject to lengthy delays and uncertainty. Broadcasters

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<sup>112</sup> Joint Petition for Rulemaking of America's Public Television Stations, The AWARN Alliance, The Consumer Technology Association, and The National Association of Broadcasters, GN Docket No. 16-142 (filed Apr. 13, 2016).

<sup>113</sup> <https://www.scrippsnews.com/sports/cbs-to-air-super-bowl-in-4k-but-there-s-a-catch>

compete for content with online and pay TV services, which have countless advantages and virtually no regulatory involvement when upgrading their technologies and adding new services to both attract and benefit consumers. By ignoring the greater dynamics in the video marketplace, the Commission risks leaving TV broadcasters – and their viewers – permanently behind. NAB strongly objects to the notion that free OTA viewers should be the only ones not to receive the benefits of new services enabled by technological innovation.

#### **IV. THE FCC SHOULD NOT INDULGE BROADCASTERS' MARKETPLACE COMPETITORS, ESPECIALLY THE PAY TV INDUSTRY, IN THEIR DELIBERATE RENT SEEKING STRATEGY TO IMPAIR BROADCAST STATIONS**

In economics, rent-seeking behavior is typically defined as strategic efforts to profit by manipulating the legal or political arena, rather than by creating economic value.<sup>114</sup> Examples of rent seeking include entities or industries getting a subsidy for a good they produce; obtaining a tariff on a good they produce to shield them from competition; or supporting a “regulation that hampers their competitors.”<sup>115</sup> Of the types of governmental actions in the regulatory marketplace, Nobel-prize winning economist George Stigler observed that firms prefer, rather than subsidies that might have to be shared among all firms in an industry, regulations that operate as barriers to entry by potential competitors, or

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<sup>114</sup> See, e.g., Roger Congleton, Ayre Hillman, and Kai Konrad, *Forty Years of Research on Rent Seeking: An Overview*, researchgate.net, at 1-3 (June 16, 2008) (in their introduction to their two-volume work on rent-seeking, stating that the modern rent-seeking literature describes decisions to invest in contesting pre-existing wealth or income through the public policy arena, rather than undertaking productive activity); see also Roger Congleton, Ayre Hillman, and Kai Konrad (eds.), *40 YEARS OF RESEARCH ON RENT SEEKING* (Springer 2008); Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 Am. Econ. Rev. 291 (June 1974) (coining the term “rent seeking” in the context of industries seeking protectionist trade policies to shield them from international competition).

<sup>115</sup> David Henderson, *Rent Seeking*, <https://www.econlib.org/library/Enc/RentSeeking.html>

that otherwise disadvantage products that are substitutes for their own.<sup>116</sup>

Unfortunately, for a number of years now, the pay TV industry has employed a competitive strategy of rent seeking to disadvantage their broadcast TV industry competitors.<sup>117</sup> At the Commission, the pay TV industry has called for stricter regulations and conditions on broadcasters' scale, impeded broadcast TV innovation, opposed broadcaster relief from regulation, and sought other regulatory changes intended to disadvantage broadcast TV stations in the marketplace. Even more unfortunately, the Commission has rewarded certain of the rent seeking activities described in detail below, especially by increasingly restricting broadcasters' scale and, consequently, their ability to compete against pay TV providers and other participants in the video marketplace.

Just since 2018, NCTA and its *alter ego*, the American Television Alliance (ATVA), have spent extensive resources at the FCC, submitting almost innumerable filings across numerous dockets seeking increased regulation or other restrictions on broadcasters. They have urged the Commission not only to retain its analog-era local TV ownership rule but also to make that rule more restrictive, including by expanding it to cover multicast programming streams and low power TV stations, despite the exponentially increased competition in the video marketplace.<sup>118</sup> They have urged the Commission to impose onerous conditions on

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<sup>116</sup> See George Stigler, *The Theory of Economic Regulation*, 2 Bell J. of Econ. & Mgmt. Sci. 3, 4-6 (Spring 1971); see also Christopher Carrigan & Cary Coglianese, *Capturing Regulatory Reality: Stigler's "The Theory of Economic Regulation,"* University of Pennsylvania Law School, Institute for Law and Economics, Research Paper No. 16-15, at 2 (July 2016).

<sup>117</sup> See Notice at ¶ 14 (seeking information on the "competitive strategies employed by video service providers").

<sup>118</sup> See, e.g., Letter from Mary Beth Murphy, NCTA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349 and 22-459 (Dec. 21, 2023); Letter from M.B. Murphy, NCTA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349 and 22-459 (Dec. 6, 2023); Letter from M.B. Murphy, NCTA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349 and 22-459 (Nov. 30, 2023); Comments of NCTA, MB Docket No. 22-459 (Mar. 6, 2023); Comments of NCTA, MB Docket

proposed broadcast station transactions, even those that complied with FCC rules and required no waivers and even those involving only a single broadcast TV station.<sup>119</sup> NCTA and

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No. 18-349 (Sept. 2, 2021); Comments of NCTA, MB Docket No. 18-349 (Apr. 19, 2019); see also Letter from M.B. Murphy, NCTA, to Marlene H. Dortch, FCC, MB Docket Nos. 03-185, 16-42, 22-261, 22-459 (Mar. 9, 2023) (opposing a proposal to open a new window for LPTV facilities changes until the FCC acts on NCTA's proposed changes to the local TV ownership rule to include LPTV stations). Accord Letter from Michael Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349 and 22-459 (Dec. 20, 2023); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 22-459, 23-405 (Dec. 6, 2023); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 22-459 (Nov. 2, 2023); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 22-459 (Oct. 18, 2023); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 22-459 (Oct. 16, 2023); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 22-459 (Oct. 18, 2023); Reply Comments of ATVA, MB Docket Nos. 18-349, 22-459 (Mar. 20, 2023); Comments of ATVA, MB Docket Nos. 18-349, 22-459 (Mar. 3, 2023); Further Reply Comments of ATVA, MB Docket No. 18-349 (Oct. 1, 2021); Further Comments of ATVA, MB Docket No. 18-349 (Sept. 2, 2021); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 18, 2021) (Chairwoman's Office Meeting); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 18, 2021) (Bureau Meeting); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 18, 2021) (Starks Office Meeting); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 18, 2021) (Carr Office Meeting); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71 (Mar. 17, 2021); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 10-71, 15-216 (Feb. 5, 2021); Letter from M. Nilsson, Counsel to ATVA, to Marlene H. Dortch, FCC, MB Docket Nos. 18-349, 19-275 (Nov. 6, 2019); Comments of ATVA, MB Docket No. 18-349 (Apr. 19, 2019). And ATVA "partners" have called for effectively reducing the national TV ownership cap. See, e.g., Comments of DISH Network, MB Docket No. 17-318 (Mar. 19, 2018); Reply Comments of DISH Network, MB Docket No. 17-318 (Apr. 18, 2018) (calling for repealing the UHF discount while retaining the 39 percent cap); <https://americantelevisionalliance.org/about-us/> (identifying ATVA partners)

<sup>119</sup> See, e.g., Letter from Radhika Bhat, NCTA, to Marlene H. Dortch, FCC, MB Docket No. 22-162 (June 22, 2022) (urging FCC to impose conditions on proposed Standard General (SG)-TEGNA transaction); Comments of NCTA, MB Docket No. 22-162 (Jan. 13, 2023) (discussing six proposed conditions on SG-TEGNA transaction); Comments of ATVA, MB Docket No. 22-162 (June 22, 2022) (one of several ATVA filings urging FCC to request more information about and impose conditions on SG-TEGNA deal); Comments of NCTA, MB Docket No. 19-30 (Mar. 18, 2019) (urging FCC to impose conditions on proposed Nexstar-Tribune transaction); Comments of ATVA, MB Docket No. 19-30 (Mar. 18, 2019) (seeking to delay FCC consideration of Nexstar-Tribune transaction); Informal Objection of NCTA, File No. 0000214896 (June 20, 2023) (objecting to assignment of a single station in Michigan).

ATVA have attempted to burden and impede the broadcast industry's transition to ATSC 3.0, despite the enhanced services this standard enables TV stations to offer to consumers.<sup>120</sup>

NCTA has even objected to NAB's proposed reforms to the FCC's regulatory fee assessment methodologies.<sup>121</sup>

The pay TV industry, moreover, has spent at least two decades filing countless objections to and proposals for additional regulation of the retransmission consent system established by Congress, many of which effectively sought suspension of statutory provisions, including the fundamental requirement in Section 325(b) of the Act that MVPDs may carry broadcast signals only with stations' consent.<sup>122</sup> The pay TV industry has expended millions

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<sup>120</sup> See, e.g., Letter from M.B. Murphy to Marlene H. Dortch, FCC, GN Docket No. 16-142 (Feb. 23, 2023) (urging FCC to require that broadcasters make a showing of necessity before being permitted to engage in lateral hosting to continue to provide ATSC 1.0 service during the transition); Comments of NCTA, GN Docket No. 16-142 (Feb. 11, 2022) (urging FCC to adopt limits on the provision of multicast streams during the transition to Next Gen TV); Petition for Reconsideration of NCTA, GN Docket No. 16-142 (Mar. 5, 2018) (proposing requirements that would: (i) force broadcasters to provide high definition streams on their ATSC 1.0 signals throughout the transition to Next Gen TV, (ii) prohibit broadcasters from negotiating with cable companies to provide for voluntary carriage of ATSC 3.0 signals, and (iii) create new requirements regarding patent licensing by entities not participating in a standards development process or regulated by the FCC); Petition for Reconsideration of ATVA, GN Docket No. 16-142 (Mar. 5, 2018) (urging FCC to: (i) restrict negotiations for carriage of ATSC 3.0 signals, (ii) prohibit low-power and translator stations from flash-cutting to ATSC 3.0, and (iii) require stations to provide advance notice before changing the resolution or picture quality of programming).

<sup>121</sup> See, e.g., Comments of NCTA, MD Docket Nos. 22-223 and 22-301 (Nov. 25, 2022); Comments of NCTA, MD Docket No. 21-90 (Nov. 5, 2021).

<sup>122</sup> See, e.g., Establishment of a Digital Transition Quiet Period for Retransmission Consent, Petition for Expedited Rulemaking of Cequel Communications, LLC *et al.*, MB Docket No. 98-120 (Apr. 24, 2008); Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent of Time Warner Cable Inc., *et al.*, MB Docket No. 10-71 (Mar. 9, 2010). When the FCC more recently examined the reciprocal requirement to negotiate retransmission consent in good faith, pay TV interests again offered various proposals for forced retransmission of broadcast signals, contrary to the express terms of Section 325(b)(1)(A). See, e.g., Comments of ATVA, MB Docket No. 15-216, at 47-48 (Dec. 1, 2015); Reply Comments of ATVA, MB Docket No. 15-216, at 28-29 (Jan. 14, 2016); ATVA Ex Parte

of dollars toward ATVA's efforts dedicated solely to altering the retransmission consent process to broadcasters' detriment.<sup>123</sup> That amount buys a lot of rent-seeking activity directed only at TV broadcasters.

The pattern of impasses in retransmission consent negotiations over the past decade further illustrate the rent seeking behavior of the pay TV industry. Increases in disruptions, whether measured by frequency or length of time, have occurred when the FCC and/or

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Communication, MB Docket Nos. 15-216 and 10-71, at 1-2, 5 (Mar. 15, 2016); Comments of Mediacom Comm. Corp., MB Docket No. 15-216, at 22-26, 40-41 (Dec. 1, 2015); Comments of Time Warner Cable Inc., MB Docket No. 15-216, at 27-28 (Dec. 1, 2015); see also NAB Written Ex Parte Communication, MB Docket Nos. 15-216, 10-71 (Mar. 17, 2016) (refuting the pay TV industry's proposals in detail); *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2728 (2011) (stating that the statute "expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent"). Pay TV interests also have made innumerable other proposals to limit how broadcasters negotiate for retransmission consent and to prevent broadcasters from even seeking to discuss numerous issues as part of retransmission negotiations. See e.g., Reply Comments of NAB, MB Docket No 15-216, at 14-19, 28-41, 56-58 (Jan. 14, 2016) (refuting MVPD proposals to outlaw the bundling of programming by broadcasters; prevent broadcasters from negotiating about channel position/tier placement, which devices may be used to access their content, and the methodology for counting subscribers and calculating payment; prohibit broadcasters from warning their viewers of a possible impasse; regulate the length and expiration date of retransmission contracts; investigate how broadcasters spend their retransmission monies; require broadcasters to publicly disclose their retransmission consent contracts, etc.). Notably, pay TV interests have been calling on the FCC and/or Congress to eliminate or alter the retransmission consent process even before broadcasters were receiving any significant cash compensation, and merely because broadcasters had the temerity to elect retransmission consent rather than must carry. See, e.g., Reply Comments of Time Warner Cable Inc. (TWC), MB Docket No. 05-28, at 1, 3, 5 (Mar. 31, 2005); accord TWC Reply Comments, MB Docket No. 04-207, at 11-12 (Aug. 13, 2004) (calling upon FCC to urge Congress to reevaluate retransmission consent because so many TV stations were opting for it, and complaining about the transaction costs of negotiating and administering retrans consent agreement with broadcasters both large and small).

<sup>123</sup> A review of quarterly LD-2 Lobbying Reports revealed that ATVA, since late 2010, has expended \$7.82 million, most of that amount (\$6.89 million) being paid to a partisan (Republican-only) lobby shop, Fierce Government Relations, with the remainder paid to two other lobby shops. ATVA's executive director is a partner at Fierce Government. See <https://americantelevisionalliance.org/about-us/>; <https://www.fiercegr.com/our-story/> (accessed May 22, 2024).

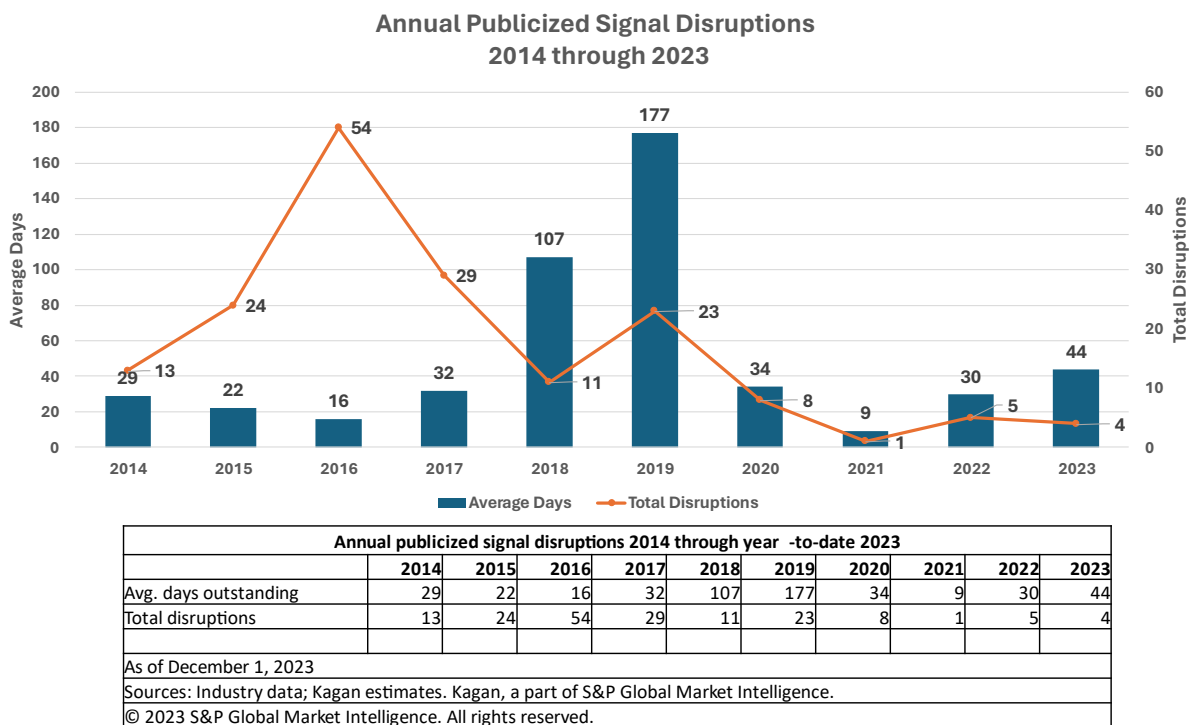
Congress actively contemplate changes to the retransmission consent regime, and the pay TV industry's incentives to show problems with the retransmission process that government must "fix" to the disadvantage of broadcasters accordingly increase.<sup>124</sup> As shown below, there were a record high number of disruptions in 2016 (54 disruptions), when the Commission, as directed by Congress in the STELA Reauthorization Act of 2014, was evaluating whether to change the totality of the circumstances test in its retransmission consent good faith rules (and ultimately determined that it would not do so).<sup>125</sup> Similarly, the average length of disruptions was at its highest in 2019 (an average of 177 days), when Congress was deliberating a further extension of the Satellite Television Extension and

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<sup>124</sup> In fact, as even the pay TV industry on very rare occasion has admitted, retransmission consent and program carriage negotiations overall "typically end without any loss of service for subscribers," and NCTA members have estimated in FCC filings that "99% are resolved with no loss of service." Reply Comments of NCTA, MB Docket Nos. 19-347, *et al.*, at 2 and n.6 (Feb. 21, 2020) (making this unexpected admission in opposing a proposed requirement for cable operators to provide advance notice to subscribers of potential service changes when carriage negotiations are ongoing during the last 30 days of a contract). Elsewhere, the pay TV industry consistently and erroneously complains about the dramatically increasing number of retransmission consent disputes. See, e.g., Comments of ATVA, MB Docket No. 23-427, at 1 (Feb. 26, 2024). NAB again recently demonstrated the inaccuracy of those claims and the FCC's error in crediting them. See, e.g., NAB Reply Comments, MB Docket No. 24-20, at 4-5 (Apr. 8, 2024) and NAB Reply Comments, MB Docket No. 23-427, at 4-5 (Mar. 26, 2024) (demonstrating that retransmission consent disruptions occurred at about the same rate over the past four years as occurred for the first 20 years of the retransmission consent regime). See also, e.g., BIA Kelsey, *Updated Analysis of Carriage Interruptions on Viewing Hours: 2011-2015* (Feb. 3, 2016), attached to NAB Written Ex Parte Communication, MB Docket No. 15-216 (Feb. 8, 2016) (confirming earlier studies showing that interruptions in broadcast signal carriage affected a truly miniscule amount of total consumer viewing hours from 2006-2010, and finding that such service interruptions impacted, on average, only 0.01486 percent of TV viewing hours annually from 2011-2015).

<sup>125</sup> See *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216 (rel. Sept. 2, 2015); *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog, Chairman Tom Wheeler (July 14, 2016) (concluding a statutorily mandated review of the FCC's retransmission consent rules by stating that: "[b]ased on the staff's careful review of the record, it is clear that more rules in this area are not what we need at this point . . . So, today I announce that we will not proceed at this time to adopt additional rules governing good faith negotiations for retransmission consent.").

Reauthorization Act (STELAR), the periodic reauthorization of which was seized upon by the pay TV industry as a legislative vehicle to lobby for changes to retransmission consent.<sup>126</sup>



The FCC must recognize the rent-seeking behavior of the pay TV industry for what it is – a deliberate competitive strategy to use the Commission to advantage subscription video services in the marketplace by increasing burdens on, and reducing the competitiveness of, the free OTA broadcast industry. The Commission should refrain from indulging this strategy,

<sup>126</sup> See, e.g., Prepared Statement of Emily Barr, President and CEO, Graham Media Group and Television Board Chair, NAB, Before the U.S. Senate Committee on Commerce, Science & Transportation (Oct. 23, 2019) (“Over the past five months alone as Congress has debated [the Satellite Television Extension and Reauthorization Act (STELAR)], AT&T-DIRECTV has been involved in 10 retransmission consent impasses with broadcast groups across the country impacting more than 179 stations. (By comparison, during this same period last year, AT&T-DIRECTV was involved in only one impasse and it affected only a single station.) These anti-consumer negotiating tactics are encouraged every five years by STELAR's renewal.”).

which not only harms broadcast TV stations and their services to local communities but also competition in the video marketplace more broadly. NAB further observes that entities other than those in the pay TV industry support regulations (even repealed ones) on local broadcast stations, often due to their own reasons for opposing broadcasters that have nothing to do with the public's interest. Representatives of the music industry may raise their hands here.<sup>127</sup>

**V. CONSISTENT WITH CONGRESSIONAL INTENT, THE FCC SHOULD UPDATE ITS REGULATORY APPROACH TO PRESERVE LOCAL STATIONS' COMPETITIVE VIABILITY AND THE PUBLIC'S FREE OVER-THE-AIR SERVICES**

Given the intense competition broadcasters face in today's video and audio marketplace, the Commission should rethink its long-standing attitude toward radio and TV stations as existing to be regulated. Instead, the FCC now must consider how its regulatory

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<sup>127</sup> See, e.g., Comment of the musicFIRST Coalition and the Future of Music Coalition (Coalitions), MB Docket No. 24-14 (Mar. 11, 2024) (taking issue with FCC's earlier repeal of the main studio rule). NAB again points out the suspect motivations of the multi-billion-dollar music industry for participating in various FCC proceedings, including arguing in quadrennial reviews that radio broadcasters should remain confined to suboptimal analog-era ownership structures. As previously explained, the Coalitions have involved themselves in FCC proceedings affecting broadcasters due to frustration over their continued failure to persuade Congress to establish a sound recording performance right for terrestrial radio. See, e.g., NAB Written *Ex Parte* Communication, MB Docket No. 18-349, at 13-16 (Feb. 16, 2022); NAB Reply Comments, GN Docket No. 22-203, at 19-25 (Aug. 1, 2022); NAB Written *Ex Parte* Communication, MB Docket No. 19-310, at 3-5 (Mar. 25, 2021). The Coalitions' unhappiness over copyright law gives them no expertise or insight into FCC policies. In any event, the music industry, dominated by just three major international labels earning billions more in revenue than all 11,000 full power commercial AM/FM stations combined, has no conception of the competitive realities facing radio stations providing services free to the public across thousands of local communities. According to recent reports, the three major music companies were jointly generating about \$2.9 million *per hour* in 2023. T. Ingham, *The 3 Major Music Companies Are Now Jointly Generating Approximately \$2.9M Per Hour*, musicbusinessworldwide.com (May 15, 2023). In remarkable contrast, the vast majority of radio stations earn *less than \$2.9 million per year* in advertising revenues. See Section II., *supra*, 2023 Radio Station Advertising Revenues by Market Rank (showing that in 2023, radio stations in all Nielsen Audio market size ranges, except markets 1-10, earned on average less – and often much, much less – than \$2.9 in ad revenues *for the entire year*).

framework harms the economic viability of local stations and their consequent ability to offer the programming and services, including local news, upon which Americans rely. This focus is necessary to comport with congressional intent in the Communications Act of 1934 (Act) and other major legislation and to promote the FCC's own public interest goals.

In the Act, Congress established broadcasting as a privately-owned, not a publicly-owned or state-supported service, with stations as private enterprises subject to the marketplace.<sup>128</sup> Congress also established a system in which the Commission must license broadcast stations to local communities across the nation in the public interest, convenience

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<sup>128</sup> In fact, Congress did not even consider government ownership or financing of broadcast stations as an alternative. Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A Legislative History of the Communications Act of 1934, at 3, 11 (Max D. Paglin ed., 1989). The legislative history of the 1927 Radio Act “reveals no attention to the possibility of government ownership/operation of broadcast stations.” *Id.* at 12. When the 1934 Act was being debated, moreover, Congress rejected a proposal to direct the FCC to set aside 25 percent of the broadcast frequencies or comparable airtime for use by educational, religious and other institutions, in part due to concerns as to how these noncommercial educational and welfare institutions would financially support their operations. *Id.* at 13-14. The 1934 Act specifically provides that all applications for station licenses must set forth facts as the FCC may prescribe as to the qualifications of an applicant to operate a station, including “financial” qualifications. 47 U.S.C. § 308(b); see, e.g., *Mission Broad. Corp. v. FCC*, 113 F.3d 254, 257 (D.C. Cir. 1997) (upholding FCC decision denying applicants a permit to operate a TV station on the ground that each had failed to demonstrate it had the “reasonable assurance of financing needed to be awarded a permit”). As the Supreme Court recognized over 80 years ago, “the field of broadcasting is one of free competition,” with stations surviving or failing in a commercial marketplace, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940), and the FCC, as well as the Court, has recognized for many decades that broadcasters’ financial wherewithal is a significant factor in providing quality service to the public. *Id.* at 475 (“An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into the applicant’s financial qualifications to operate the proposed station.”).

and necessity.<sup>129</sup> Accordingly, Congress not only placed obligations on licensed broadcasters but also on the Commission.

To fulfill Congress's vision, the FCC must ensure that its regulatory framework enables TV and radio stations to serve the public interest and their communities of license, which means, as a practical matter, that broadcasters must remain economically viable in a highly competitive marketplace and capable of fulfilling their obligation to provide programming services at no cost to the public. Congress has repeatedly reconfirmed through legislation its intent that broadcasting remains a competitively viable service in a changing marketplace. In major legislation including the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act) and the Telecommunications Act of 1996 (1996 Act), Congress acted to protect and promote the competitiveness of broadcast stations and the economic viability of OTA local broadcasting.<sup>130</sup> The FCC's broadcast regulatory policies should reflect Congress's

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<sup>129</sup> Section 307(b) of the Act requires the FCC to distribute licenses and frequencies "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b). When considering broadcast applications, Section 309(a) requires the FCC to determine whether the grant of each application would serve the public interest, convenience and necessity and, if so, directs the FCC to grant the application. 47 U.S.C. § 309(a). See also 47 U.S.C. § 307(a) (requiring FCC to grant a station license to any applicant "if public convenience, interest, or necessity will be served thereby"); § 310(d) (providing that before any station license is transferred or assigned, FCC must find that the public interest, convenience and necessity will be served).

<sup>130</sup> Congress's "overriding" purpose in enacting the must-carry provisions of the Cable Act was to "guarantee the survival" of broadcast TV and ensure that every individual could access free TV programming. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 647, 662-63 (1994) (agreeing with Congress that "preserving the benefits of free, over-the-air local broadcast television" was an "important governmental interest"). In highly specific legislative findings, Congress reaffirmed the value it places on local commercial TV stations serving communities throughout the country and on the viability of local OTA TV stations. See Cable Act, § 2(a)(9) (stating that having cable systems carry the signals of local commercial TV stations was necessary to serve the goals of providing a fair, efficient and equitable distribution of broadcast services under § 307(b) of the Act); § 2(a)(12) (stating "[t]here is a substantial governmental interest in promoting the continued availability of . . . free television programming"); § 2(a)(16) (stating that without a must-carry requirement, "the economic

clear intent to “ensure that our system of free broadcasting remain vibrant.”<sup>131</sup> The Commission has far too often neglected this fundamental goal.

In fact, the FCC has only rarely recognized that the broadcast “industry’s ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”<sup>132</sup> This focus on the economic standing of local stations has become even more urgent in today’s marketplace, where broadcasters struggling with lack of scale and burdensome regulation face intense competition for the advertising revenues vital to support station operations. Given the Act’s emphasis on equitably distributing broadcast services across states and communities, 47 U.S.C. § 307(b), the FCC must take special care

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viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized”). 47 U.S.C. § 521 nt. In the main legislative report on the Cable Act, the Senate Commerce Committee found that enactment of retransmission consent was necessary to address a “distortion in the video marketplace which threatens the future of over-the-air broadcasting.” S. Rep. No. 102-92, at 35 (1991), *reprinted in* 1992 U.S.C.C.A.N 1133, 1168. Congress similarly enacted the 1996 Act “to preserve and to promote the competitiveness of over-the-air broadcast stations.” H.R. Rep. No. 104-204, at 48 (1995), *reprinted in* 1996 U.S.C.C.A.N 10, 11. The section of this House Report addressing broadcasting was entitled “Broadcast Communications Competitiveness.” *Id.* at 54. It stressed that free OTA “broadcasting should remain a vital element” of the communications marketplace, and that Congress and the FCC needed to “reform Federal policy and the current regulatory framework to reflect the new marketplace realities” to “ensure the industry’s ability to compete effectively in a multichannel media market.” *Id.* at 55. Section 202(h) of the 1996 Act, moreover, mandated that the FCC regularly examine the media marketplace, determine whether its ownership rules “remain necessary in the public interest as the result of competition,” and repeal or modify those that are not. A long series of satellite television bills also evidence Congress’s concern with preserving our system of local broadcast TV stations and OTA television. See, e.g., S. Rep. No. 113-322, at 2-3 (2014) (discussing legislative limits on importation of “distant” TV signals to prevent non-local signals from “taking viewers away from local broadcast television stations that provide community-focused programming such as local news and weather,” and stating that Congress determined that “over-the-air television would not be adversely impacted” by a license permitting satellite carriers to provide “local-into-local service,” as such service would give more viewers access to local stations, thereby increasing their advertising revenues).

<sup>131</sup> S. Rep. No. 102-92, at 36 (1991), *reprinted in* 1992 U.S.C.C.A.N 1133, 1169.

<sup>132</sup> *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992).

to ensure all its policies, including its ownership rules, enable the competitive viability of radio and TV services, including local news, in mid-sized and small markets with limited advertising bases. The FCC's oft-repeated goal of promoting broadcast localism threatens to become an empty phrase, give that its own policies significantly hamper the ability of local stations to provide valued – and increasingly expensive – programming to their communities.

NAB urges the Commission to take seriously its role under the Communications Act, the Cable Act, the 1996 Act, and other legislation in fulfilling Congress's intent to maintain a system of broadcast stations able to operate as viable private enterprises in a competitive market *and* able to serve the public interest and local communities effectively. Particularly in this proceeding governed by a competition-centric statute,<sup>133</sup> that means recognizing the unprecedented competition in the audio and video markets and the regulatory and market structures currently undermining broadcasters' competitiveness in those markets. Rather than merely describing the various competing streaming, multichannel, and broadcast services, the 2024 report should analyze what competition in the audio and video markets means for consumers' and local communities' audio and video services, including the free, local services offered by broadcasters, and how the FCC's broadcast regulatory framework disparately impacts advertising-supported broadcast services offered free to the public. Such a report would help lay the groundwork for necessary future proceedings in which the Commission reexamines its existing regulatory regime, looking to eliminate or revise asymmetric rules – often supported by broadcasters' self-seeking competitors – that uniquely burden and discourage investment in broadcast stations providing services free to local communities.

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<sup>133</sup> In setting forth the contents and requirements of the mandated report to Congress, Section 163 uses the terms “competition” or “competitive” 11 times.

## VI. CONCLUSION

Competition for audiences and advertisers in the communications marketplace is fierce and flourishing. Far from being limited to a few geographically proximate broadcast stations as in the past, consumers today enjoy an over-abundance of audio and video choices accessible from virtually anywhere via any device, 24-7-365. Advertisers in local markets across the country similarly may choose from a plethora of competing ad options, whether traditional, mobile, or online, including Big Tech's dominant platforms.

NAB again urges the Commission to carefully analyze all the non-broadcast sources of competition to local radio and TV stations in its upcoming report and in future broadcast regulatory proceedings. Previous competition reports to Congress correctly recognized that radio and TV broadcasters participate in broader audio and video markets that include online content providers and multichannel programming distributors. But to date, the Commission has failed to reckon with how that robust competition impacts broadcast stations and their ability to offer OTA services free to the public and how its asymmetric and overly burdensome broadcast regulatory regime should be reformed to account for these undisputed – and indisputable – marketplace realities.

Respectfully submitted,

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