

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

In the Matter of)	
)	
2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 14-50
)	
2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 09-182
)	
Promoting Diversification of Ownership in the Broadcasting Services)	MB Docket No. 07-294
)	
Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets)	MB Docket No. 04-256
)	

**PETITION FOR RECONSIDERATION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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EXECUTIVE SUMMARY

After seven years of evaluating the rapidly changing media marketplace, the Federal Communications Commission (FCC) recently adopted an order that remarkably retained – and in some cases made more stringent – its long-standing broadcast ownership rules.¹ Because these rules are divorced from current competitive realities, are based on faulty premises or misunderstandings of the law, lack evidentiary support and prevent local broadcasters from competing and serving their local communities effectively, the National Association of Broadcasters (NAB)² urges the Commission to reconsider major aspects of its Order. Specifically, NAB requests the FCC to reconsider its decisions to (1) retain the local television ownership rule; (2) ratchet up that rule by attributing TV joint sales agreements; (3) require disclosure of virtually all agreements by TV stations to share services, regardless of their nexus to core station operations; (4) retain the 1970s-era print newspaper/broadcast cross-ownership ban; and (5) maintain existing restrictions on radio/TV cross-ownership. Rather than retain or expand these rules, the vast and continuing changes across the media landscape dictate that they be eliminated or substantially loosened.

The 1996 Telecommunications Act requires the FCC to review its ownership rules every four years and repeal or modify those no longer necessary in the public interest as the result of competition.³ Despite this directive, the FCC nevertheless elected to maintain rules originating from a time when (1) three broadcast TV networks dominated the marketplace; (2)

¹ *2014 Quadrennial Regulatory Review, Second Report and Order*, 31 FCC Rcd 9864 (2016) (Order). See also *2014 Quadrennial Regulatory Review, Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd 4371 (2014) (2014 FNPRM or FNPRM).

² 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.

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

cable and satellite provided no meaningful alternatives, let alone ones offering hundreds of channels with thousands of original programs; and (3) the internet, over-the-top video services and social media did not exist. The expert agency's conclusion that these tectonic shifts have had no real competitive impact on local broadcast stations is untenable.

To arrive at this result, the Commission had to ignore extensive empirical evidence that NAB submitted about broadcasters specifically and the marketplace generally.⁴ Instead, the Order improperly relies on woefully outdated data (some of which goes all the way back to the 2002 biennial review); makes numerous conclusions without citing any "evidence" other than its own unsupported assertions, including frequently repeating the same unsupported assertions from earlier ownership reviews; and even cites evidence that does not actually support the FCC's position. Notably, neither the FCC nor any interested third parties offered *any* studies, serious research or new arguments explaining why the decades-old broadcast-only ownership rules should remain in place, let alone unchanged.

Ultimately, the Order in no way represents the "fresh look" at the media marketplace required by § 202(h) to ensure that the rules keep pace with competitive changes.⁵ The FCC

⁴ See, e.g., Comments of NAB, MB Docket Nos. 14-50, *et al.*, at 9-72 (Aug. 6, 2014) (NAB Comments); NAB *Ex Parte* Letter from R. Kaplan and J. Timmerman, MB Docket Nos. 14-50, 09-182 (June 6, 2016) (June 6 *Ex Parte*); NAB *Ex Parte* Letter from R. Kaplan and J. Timmerman, MB Docket Nos. 14-50, 09-182 (June 21, 2016) (June 21 *Ex Parte*); NAB *Ex Parte* Letter from R. Kaplan and J. Timmerman, MB Docket Nos. 14-50, 09-182 (July 7, 2016) (July 7 *Ex Parte*); NAB Notice of *Ex Parte* Communication from E. Dozier, MB Docket Nos. 14-50, *et al.* (July 15, 2016) (July 15 *Ex Parte*); NAB *Ex Parte* Letter from R. Kaplan and J. Timmerman, MB Docket Nos. 14-50, 09-182 (July 29, 2016) (July 29 *Ex Parte*).

⁵ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004) (*Prometheus I*); see also *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (*Prometheus III*) (the "very purpose of § 202(h)" is to "function as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace'") (citing *Prometheus I*, 373 F.3d at 391). The D.C. Circuit Court of Appeals has found that § 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair*

should not retain rules that limit broadcasters' ability to compete, particularly against increasingly consolidated multichannel video programming distributors (MVPDs) and online video providers, and that harm local stations' ability to improve, or even continue providing, the services that consumers value. For stations and their services to survive, let alone thrive, broadcasters must be permitted to achieve economies of scale and scope, particularly in their provision of local news.⁶

Local TV Rule. Looking at its decisions on specific rules, the FCC had no legal or evidentiary bases for retaining the current numerical limits or either prong – the eight-voices test or the top-four restriction – of the antiquated local TV rule. The FCC's sole basis for retaining the rule is its unjustifiable belief that broadcast TV stations compete for audiences and advertisers only among themselves. To maintain this fiction, the Order remains willfully blind about the millions of viewers and billions in advertising dollars that MVPDs and digital video options attract, to the disadvantage of local stations. The Order fails to offer any reasonable rationale, let alone any empirical evidence, that eight independently owned TV stations are necessary to preserve competition, and ignores clear evidence that they are not by improperly refusing to review the most relevant empirical evidence in the record.⁷ The FCC's failure to identify any relevant competitive distinctions between markets with fewer than

Broad. Group, Inc. v. FCC, 284 F.3d 148, 159 (D.C. Cir. 2002) (also stating that § 202(h) was designed to continue the process of deregulation).

⁶ Jeffrey Eisenach and Kevin Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 1-3 (June 2011), attached to NAB Reply Comments, MB Docket No. 10-71 (June 27, 2011) (incorporated into MB Docket No. 09-182, see NAB Comments, MB Docket No. 09-182, at 4-5 (Mar. 5, 2012)). *Accord* Decl. of Mark Israel and Allan Shampine, NAB Comments, MB Docket No. 10-71, at Appendix B ¶¶ 49-51 (June 26, 2014); see also June 6 *Ex Parte*, at 4 & n.12; NAB *Ex Parte* Submission, MB Docket No. 09-182, at 3-10 (Mar. 21, 2014) (discussing importance of achieving scale and scope economies to local news production and to the economic health of smaller market TV stations).

⁷ NAB *Ex Parte* Letter from R. Kaplan and J. Timmerman, MB Docket Nos. 14-50, 09-182 (July 19, 2016) (July 19 *Ex Parte*), attaching Economists Incorporated study.

eight TV stations, and those with eight or more, renders retention of the eight-voices standard arbitrary and capricious and contrary to § 202(h). Similarly, the Order offers only general assertions for retaining the top-four restriction, unsupported by any current evidence. The Commission should eliminate the top-four restriction and the eight-voices test, and permit common ownership of more than one station and two of the top-four rated stations in all local markets, subject to the limits of antitrust law.

TV Joint Sales Agreements (JSAs). Rather than reforming the local TV rule to reflect current realities, the FCC did the exact opposite, making the rule more restrictive by attributing most same-market TV JSAs, without even trying to show that a more stringent rule is in the public interest given current competition. That decision is contrary to § 202(h) and the Communications Act of 1934 (Act), and is also arbitrary and capricious. The Order does not contest the public interest benefits of JSAs as demonstrated by the record, and fails to cite actual evidence that any JSA has allowed the exercise of undue influence over any TV station or has harmed competition. The *per se* attribution of the joint sale of modest amounts of advertising is, moreover, wholly inconsistent with other recent FCC attribution decisions.

TV Shared Service Agreements (SSAs). NAB also urges the Commission to reconsider its vastly overbroad and unnecessary mandate that TV stations disclose virtually all sharing agreements made with other stations, whether in the same market or different markets, and no matter how far removed from core station operations. This new rule epitomizes disclosure for the sake of disclosure, rather than for any demonstrated regulatory need, as it requires the disclosure of all sharing agreements concerning “any station-related services,” which evidently would encompass everything from janitorial to catering to maintenance to security services and which do not implicate the interests of the viewing public.

Cross-Ownership Rules. Although the Third Circuit in *Prometheus III* expressed clear concern over the newspaper/broadcast cross-ownership ban, despite the FCC’s determination “more than a decade ago that it is no longer in the public interest,” 824 F.3d at 51, the Order unjustifiably reversed course and retained the complete ban, as well as restrictions on radio/TV cross-ownership that the FCC had tentatively concluded were no longer necessary to promote the public interest. To reach this result, the FCC merely supposes that a connection exists between its ownership rules and viewpoint diversity – even while conceding that it has not demonstrated such a connection; ignores the transformation in how Americans obtain, create and share news and information through internet websites, social media and applications; applies an irrational double-standard in analyzing the sources that contribute to viewpoint diversity; and selectively relies on older, less precise data while disregarding the latest and most relevant material in the record. Because viewpoint diversity is the FCC’s only justification for retaining the cross-ownership rules, and the Order does not provide – nor can it on this record – a reasonable basis for concluding that these rules are necessary in the public interest to promote diversity, the retention of the rules violates § 202(h), the Administrative Procedure Act (APA) and the Act, and must be reconsidered.

Promoting Diversity. Finally, the FCC should reconsider its rejection of NAB’s proposal to create an incubator program. Adopting such a program would provide a practical, effective method for increasing ownership diversity and would respond more affirmatively to the Third Circuit’s concerns in the *Prometheus* cases.

As a matter of both law and sound policy, NAB requests reconsideration and asks the FCC to reform its ownership rules as discussed in our petition and in our numerous filings and studies submitted in these proceedings.

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**PETITION FOR RECONSIDERATION OF THE
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NAB hereby requests that the Commission reconsider major portions of its 2016 Order resolving the 2010 and 2014 quadrennial reviews of the broadcast ownership rules. As explained below, the decisions retaining, and even making more stringent, unnecessary local TV station ownership and attribution rules and cross-ownership restrictions on local radio, TV and print newspapers do not serve the public’s interest in competitive and vibrant local broadcasting, fail to reflect competitive changes, are contrary to statute, and are arbitrary and capricious. The FCC therefore should eliminate or substantially reform these rules.

- I. THE FCC IMPROPERLY RETAINED BOTH PRONGS OF THE LOCAL TV RULE**
 - A. The FCC Erred in Concluding that Broadcast TV Stations Compete Only Against Themselves in the Modern Video Marketplace**

Even without considering the specific deficiencies of the eight-voices test and the top-four restriction, reconsideration of the local TV rule is warranted because it is based on an

assumption bearing no resemblance to reality – that broadcast TV stations exist in a separate competitive universe lacking the internet, MVPDs, online and mobile video services and all other competitors. The FCC’s continued insistence that TV stations effectively compete only with themselves is contrary to Section 202(h)’s directive that the ownership rules reflect competitive changes, and is contrary to record evidence.

The FCC’s attempts to justify its analog-era view of the video marketplace underlying the local TV rule, last reformed in 1999, are wholly inadequate and lacking the required evidentiary basis. In explaining why competition from MVPDs, the internet and mobile devices purportedly “remains of limited relevance,” the Order (at ¶ 27) cites no empirical evidence, but merely repeats the assertions that online and MVPD video programming options are “national” in focus and therefore not “meaningful substitute[s] in local markets.” Even if the FCC’s broad characterization of non-broadcast video options were correct (which it is not), it is beside the point. As NAB explained, the competitive impact on local stations from other video services – whether predominantly local, regional, national or international in focus – is the same: they divert audiences and advertisers from local TV stations to non-broadcast sources. NAB Comments at 15-16; 46-47. The FCC fails to respond to NAB’s argument; fails to adequately support its own argument, relying almost exclusively on an inapposite cite to the FCC’s 2002 review;⁸ and ignores substantial record evidence showing the very significant and growing impacts on *local* TV stations from MVPD, online and mobile competitors – most of

⁸ To buttress its important conclusion about video competition in ¶ 27, the FCC refers to the 2014 FNPRM citing a passage in the 2002 biennial about *radio* and the greater importance of preserving competition for listeners rather than for radio advertising or program production. Order at ¶ 27 & n. 61 (citing *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, 13716, ¶ 246 (2003) (2002 Biennial)). The paragraph cited from the 2002 Biennial, moreover, does not discount “national” providers of audio programming because they are non-local.

which did not exist and could not have diverted audiences or advertisers away from local stations in 1999, but clearly do so now.⁹

The Order additionally asserts (at ¶ 28) that broadcast TV's "strong position" in local advertising markets supports the view that non-broadcast video program distributors are not meaningful substitutes in local markets. In making this claim, however, the Order ignores evidence about, *inter alia*, (1) long-term declines in local TV station advertising revenues, which have been in decline since the early 2000s;¹⁰ and (2) the explosive growth in digital (internet and mobile) advertising, which now has the largest, and still rapidly growing, share of advertising in local markets.¹¹ As a result, TV station advertising revenues, as a proportion of

⁹ See, e.g., NAB Comments at 18-59 & Att. A, B & D; June 6, July 19 and July 29 *Ex Partes*. Broadcast station viewership levels have declined dramatically due to competition from cable alone. NAB Comments at 46 (chart showing that broadcast viewer shares declined from nearly 90% in 1983 so that today, viewing shares of basic cable are about *double* broadcast viewing shares, with further declines projected). These millions of viewers in local markets are watching more cable and online scripted programming than ever before. June 6 *Ex Parte* at 5-6 (in 2002, over 73% of original scripted series were on broadcast TV stations but in 2015, less than 36% of the increased number of series were on broadcast TV). Cable systems also offer popular regional and local sports and news networks to viewers in local markets. The majority of viewers and TV households have subscriptions to Netflix, Amazon Prime and/or Hulu (with close to half having subscriptions to more than one), and 65% of households have at least one internet-connected TV, up from 24% in 2010. *Id.* at 5; July 29 *Ex Parte* at 4. MVPD and online options that divert the considerable majority of viewers away from TV stations are not of "limited relevance" to a rational analysis of the local TV rule. Order at ¶ 27. The fact that 10% of the U.S. population lacks broadband access at speeds sufficient to stream or download video programming via the internet does not permit the FCC to ignore under § 202(h) online viewing options used by most Americans, as the Order implies (at ¶ 30).

¹⁰ SNL Kagan data submitted in 2014 showed that local TV station advertising revenues have not equaled, let alone surpassed, revenues earned in 2000 and were not projected to do so by 2019. NAB Comments at 37. An analysis of 2015 SNL Kagan data showed that, adjusted for inflation using Year 2000 dollars, TV station ad revenue declined by over 41% (\$23.33 to \$13.72 billion) from 2000 to 2015. Even without adjusting for inflation, TV station ad revenue declined 19.1% (\$23.33 to \$18.88 billion) between 2000 and 2015, and SNL Kagan has not projected a recovery in revenues. June 6 *Ex Parte* at 7-8 (projecting CAGR of zero in TV station ad revenues from 2016-2025). FCC claims about the strength and projected growth of station revenues based on 2014 data (when more current data are available) and looking at only a few years are therefore misleading. See Order at ¶ 28 & n. 63. Even the 2012-2014 data cited, moreover, showed a 3% revenue *decline* over that short period. *Id.*

¹¹ The FCC's most recent video competition report found that local internet advertising revenue has exceeded local TV station ad revenue since 2012 and that, in 2014, local cable TV advertising totaled about 45% of local broadcast TV ad revenue. Seventeenth Annual Report, MB Docket No. 15-158 at ¶

all local video ad revenues (counting broadcast, cable, telco, internet, mobile and regional sports networks), have fallen from nearly 70% of local video ad revenues in 2003 to about 30% in 2015, and are projected to fall to 20% by 2023. June 6 *Ex Parte* at 9 (citing SNL Kagan data).

This evidence of dramatic shifts in the advertising marketplace, again discounted by the Order, undermines the FCC's conclusion that TV stations only compete among themselves for local ad dollars. The very slim evidence cited in the Order, moreover, is outdated and misleading and fails to support adequately its conclusion that the admitted growth in advertising revenues by MVPDs and digital platforms has not impacted local TV stations.¹² Finally, the Order improperly dismisses as irrelevant a 2014 study, which found "no empirical evidence" supporting the position that local TV stations compete only with other TV stations for advertising and concluded that a "properly defined" market would include non-broadcast

121, Table III.B.5. (May 6, 2016); see also July 19 *Ex Parte* at 5. SNL Kagan found in 2015 that advertising continues to shift from traditional media to digital platforms, that traditional advertising sectors will continue to experience negative growth, and that internet and mobile dominate local advertising with an estimated 31.5% share of total local ad revenue in 2015 and a projected 49.3% share of all local ad revenue by 2025. June 6 *Ex Parte* at 7-8; see NAB Comments at 34-37; 47-50.

¹² The Order (at ¶ 28) relies on the 2014 FNPRM (at ¶ 24) citing ad revenue data from 2008-2011. NAB pointed out in its 2014 Comments (at 49) that these *very same* data were not current and should not be relied upon. Quoting generalities that TV stations "continued to fare well economically" from a 2015 Pew Research Center report – especially when the 2016 report was available – likewise provides no real support for the FCC's position. Order at ¶ 28, n. 64. To bolster its argument that broadcast TV service is its own separate market, the Order cites that same 2015 Pew report (and the FNPRM, citing 2011 and 2012 data) for statements about consumer reliance on TV stations for local news, stating that viewership for local TV news "increased slightly in 2014." Order at ¶ 30 & n. 67. The available 2016 Pew report, however, found that the "gradual decline in local television [news] viewership resumed in 2015, after a brief break," with local TV newscasts losing viewers "in all three key timeslots." K. E. Matsa, *State of the News Media 2016, Local TV News: Fact Sheet*, Pew Research Center (June 15, 2016) (since 2007, average audience for late night newscasts has declined 22%). The Order's widespread reliance on non-current data makes its conclusions inherently suspect.

alternatives such as cable TV.¹³ The reasons offered for ignoring this study are illogical and unmeritorious, and illustrate the FCC's reluctance to consider evidence contrary to the Order's conclusions about competition in the video marketplace.¹⁴

B. The Eight-Voices Test Lacks Any Economic or Other Foundation

Even beyond the Order's error in concluding that the local TV rule should be based solely on competition among broadcast TV stations, the FCC's eight-voices test is nonsensical and should be eliminated. The FCC repeats its "belief" – unencumbered by any empirical evidence and citing only its own factually unsupported assertions from the 2006 review – that the eight-voices standard helps ensure that each market has a minimum of four stations affiliated with "Big Four" networks and four independently owned stations. Order at ¶¶ 56-57. This standard is wholly unrealistic, and the Order did not, and evidently could not, demonstrate that eight independently owned full-power TV stations are necessary to preserve competition, as required by § 202(h). The majority of DMAs do not even have eight full-power

¹³ Kevin Caves and Hal Singer, Economists Incorporated, *Competition in Local Broadcast Television Advertising Markets*, at 3-4 (Aug. 6, 2014), Att. A to NAB Comments (Advertising Study).

¹⁴ The Order, at ¶ 29, finds the Advertising Study irrelevant because it looks only at advertising competition and not at other factors relevant to the FCC's ownership rule, such as audience share. But the audience share of individual local stations (which is considered under the "top-four" portion of the local TV rule) has little to do with the FCC's basic market definition and whether the market should be limited to only broadcast TV stations or include other video competitors, which is the direct concern of the Study. Indeed, the FCC's own analysis of market definition does not address the audience share of local TV stations or compare their audience share to those of other video services, but does address local stations' position in the advertising market and argues that other video providers are not meaningful substitutes for advertisers in local markets. *Id.* at ¶ 28, discussed pp. 3-4, *supra*. The FCC cannot rationally argue that the Advertising Study's focus on advertising competition is not relevant to the issue of market definition when the FCC itself addresses advertising, but not audience share, in its analysis of market definition. Moreover, the Order's statistical critiques of the Advertising Study are without merit (e.g., criticizes cross-sectional regression analysis for supposed "missing variable bias" without specifying what the omitted variable might be and even though these regressions controlled for variables that prior academic work has found relevant; tries to explain away findings from the Study's fixed-effects regressions, which are more robust than statistical methods used in prior published work, by speculating that the data used suffers from either "measurement" issues or a "lack of variation in the relevant variable," which they do not). *Id.* at ¶ 29.

stations, and neither the FCC nor any commenter has shown that those markets suffer from a lack of competition that harms viewers or advertisers.¹⁵ Despite the availability of clear ways to test empirically whether eight voices is the appropriate delineation for the local TV rule, the Order neglects to identify and analyze any economically or competitively relevant distinctions between markets with fewer than eight TV stations, and those with eight or more. The FCC's consistent failure to undertake even a basic economic analysis to determine the validity of its eight-voices standard in a changing video marketplace alone renders the continued retention of the rule arbitrary and capricious. See, e.g., June 21 *Ex Parte* at 5.

Beyond this complete lack of an evidentiary basis, the Order (at ¶ 57) also fails to offer a meaningful rationale for the repetitive assertion that four (rather than say, two, or any other number) additional independent stations are essential to maintaining competition. See, e.g., NAB Comments at 55-56. The number four, and thus the number eight, appear almost randomly selected.¹⁶ The eight-voices test does not promote the maintenance of independent local news operations because, according to the FCC itself, top-four stations are the ones most likely to offer local news.¹⁷ Finally, the claim that four additional independent stations are important for competition is inconsistent with the FCC's position discussed below that the top-four stations in a market are the strongest competitors. See Order at ¶¶ 43-44. If that is

¹⁵ See, e.g., NAB Comments at 55-56; June 21 *Ex Parte* at 4. Some small markets do not have stations affiliated with all four major networks, let alone any additional stations. In these markets, even major network affiliated stations often struggle to maintain profitability, but cannot form more viable ownership structures due to the eight-voices test. See, e.g., NAB Comments at 55-57 & Att. D.

¹⁶ As Commissioner O'Rielly noted in his dissent, the FCC concluded in its 2002 biennial review that the eight-voices test was not necessary to protect competition. 31 FCC Rcd at 10060. Given that video marketplace competition has grown rapidly since that time, retention of the test today clearly violates § 202(h). See also *Sinclair*, 284 F.3d at 162-63.

¹⁷ June 21 *Ex Parte* at 5 (citing 2010 *Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶ 41 & n. 92-93 (2011) (2010 NPRM), and *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12933 (1999)).

the case, then the mere existence of additional, significantly weaker independent stations in a market will not provide effective competition to the top-four network affiliates, especially in providing news or other local content. See, e.g., NAB Comments at 56.

In addition to failing to defend its eight-voices test with either empirical evidence or a convincing rationale, the FCC also appears unable to refute a recent study showing that the rule “imposes an economically arbitrary threshold, fails to advance the Commission’s stated objective of promoting competition, and proscribes transactions that would likely be deemed procompetitive under conventional competition analysis.”¹⁸ Contrary to the Order’s unsupported beliefs, the Eight Voices Study’s econometric analysis showed that, holding other factors constant, local advertising rates are no higher in markets with fewer than eight independently owned TV stations than in markets with eight or more stations. In fact, this Study found that a *reduction* in the number of independently owned TV stations in a local market is statistically associated with a *decrease* in local advertising prices, thereby showing that the eight-voices test lacks competitive validity. Eight Voices Study at ¶¶ 33, 40-44.

Rather than address the Eight Voices Study, the Order (at n. 147) improperly refuses to consider it on the spurious grounds that it was submitted too late. But as NAB explained in response to claims that the Study untimely presented new substantive arguments, the Study in fact provides further empirical support for NAB’s arguments, made throughout the 2010 and 2014 quadrennial review proceedings, that the eight-voices test is unrealistic, unsupported by evidence or a convincing rationale, arbitrary and contrary to § 202(h).¹⁹ The

¹⁸ Kevin W. Caves and Hal J. Singer, Economists Incorporated, *An Economic Analysis of the FCC’s Eight Voices Rule*, at ¶ 3 (July 19, 2016), attached to July 19 *Ex Parte* (Eight Voices Study).

¹⁹ NAB *Ex Parte* Letter from Rick Kaplan and Jerianne Timmerman, MB Docket Nos. 14-50, 09-182, at 1-3 (July 28, 2016), responding to *Ex Parte* Letter by A. Schwartzman, *et al.* for Office of Communication, Inc. of the United Church of Christ (UCC), *et al.*, MB Docket Nos. 14-50, 09-182 (July

FCC erred in rejecting the Eight Voices Study, and the authority that the Order relies upon for doing so is inapplicable and unconvincing.²⁰ The FCC therefore must consider the Study and its findings, which, as Commissioner Pai observed in his dissent, “are fatal to the eight-voices test.” 31 FCC Rcd at 10052.

C. Given the Lack of Any Current Evidence Supporting the Blanket Top-Four Restriction, Its Retention Is Contrary to Section 202(h)

The FCC justifies the other part of its local TV rule on the supposed existence in “most” markets of a “significant cushion” of audience share points separating the top-four stations in a market from the fifth-ranked station and on the related claim that combinations among top-four stations would produce one firm with a significantly larger market share than other firms. Order at ¶¶ 43-44. The Order, however, offers no current data to support these general claims. It cites the 2014 FNPRM, which relies on a staff analysis of Nielsen data from May 2012 supposedly showing this “significant” cushion. *Id.* at ¶ 43; nn. 104, 107. But the Order and the FNPRM both fail to identify the number of markets in which this cushion existed in 2012 or how large that cushion actually was; how the cushion between the 4th and 5th ranked stations compared to the ratings cushions between other stations in local markets at that time; or how the FCC determined that a cushion qualified as “significant.”²¹ At best it cites the

22, 2016). NAB explained that 47 C.F.R. § 1.415(d), which UCC relied upon (and misstated), actually allows, rather than prohibits, *ex parte* communications after the initial comment deadlines in rulemakings; that UCC itself submitted numerous *ex parte* filings following the comment deadlines in this proceeding; and that interested parties often make *ex parte* submissions in rulemakings, which the FCC routinely considers. The FCC also frequently accepts and relies upon studies received shortly before an order is adopted. See 31 FCC Rcd at 10053, n. 47.

²⁰ The cases cited in note 147 of the Order concerned the FCC’s obligations to consider new late-filed proposals, rather than up-to-date data supporting arguments that a party had made for years. In the *Globalstar* case, moreover, the entirely new claim had been raised the same day an order was adopted, which is obviously not the situation here.

²¹ June 21 *Ex Parte* at 5-6 & n. 29 (pointing out these deficiencies in the FNPRM); see also NAB Comments at 51-54.

2002 Biennial, which found a cushion in two-thirds of the markets with five or more commercial TV stations. Order at n. 104, citing 2002 Biennial at ¶ 195. Data from 2012, let alone 2002, does not satisfy the FCC’s duty to give a “fresh look” to its rules in light of current competition. *Prometheus I*, 373 F.3d at 391.

But even if a “significant” ratings cushion exists between the 4th and 5th ranked stations in two-thirds of markets with at least five full-power commercial stations, that does not mean a blanket top-four restriction is rational. It would be inappropriate for one-third of the markets with five or more stations, and has no relevance to the dozens of smaller markets with fewer stations. The main rationale for the top-four restriction – the alleged breakpoint between the 4th and 5th ranked stations – would be accurate and applicable to only 91 of the 210 DMAs, even assuming local station ratings today follow the same pattern as in 2002.²²

The other justification for the restriction – that a combination among top-four stations would harm competition by generally resulting in a single firm with a significantly larger market share – is similarly lacking in logic and evidentiary support. Order at ¶ 44. The repetitive assertion that these combinations “reduce incentives for local stations to improve their programming” is nonsensical, *id.*, as it assumes that an owner of two stations has less incentive to maximize its audiences, and thus its advertising revenues and profits, than the owner of a single station.²³ The FCC cites no data, current or otherwise, showing that top-four combinations “generally” would result in one firm with a “significantly” larger market share than other stations. *Id.* Instead, the Order cites the 2006 quadrennial (which refers back to

²² According to BIA Media Access Pro, 137 markets currently have at least five full-power commercial stations (counting satellite stations). Two-thirds of 137 is approximately 91.3.

²³ NAB Comments at 54-55; see *also* Comments of Nexstar Broadcasting, MB Docket Nos. 14-50, *et al.* at 9-10 (Aug. 6, 2014) (high quality programming drives viewers to TV stations, and if a broadcaster offers lower quality and less popular programming, its ratings and its revenues will suffer).

the 2002 biennial) and the 2014 FNPRM, which cites both the 2006 and 2002 reviews. Order at ¶ 44 & nn. 108, 111. Again, the FCC’s reliance on its own past assertions or on “administrative feel,” rather than analysis or data, fails to satisfy Section 202(h) or the APA.²⁴

In contrast to the lack of an evidentiary basis supporting the FCC’s decision, NAB submitted substantial empirical evidence – virtually ignored in the Order – that the top one or two stations, rather than the top four, often earn significantly higher ratings and revenue than other stations in local markets. See June 21 *Ex Parte* at 5-6 (summarizing some of this data). Due to the large disparities among the top-four stations, especially in small and medium-sized markets, NAB found that the combination of the audience share and/or revenue of the third- and fourth-ranked stations is less, often very substantially less, than the ratings or revenue of the top-ranked station.²⁵ Given unrefuted evidence showing that combinations among top-four stations very frequently do *not* result in an entity with an audience or revenue share “significantly” larger (or even equal to) the share of the top station, the retention of a blanket top-four restriction is arbitrary and capricious.²⁶

²⁴ *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 50 (D.C. Cir. 1978) (vacating as arbitrary an FCC decision relying on “administrative feel,” rather than reasoned consideration of material facts).

²⁵ A 2012 study by BIA/Kelsey found that the combination of the revenues of the third- and fourth-ranked stations was less than the revenue of the top-earning station in 82 of the 159 markets with at least four full-power commercial TV stations, and that only six of these 82 markets were among the top 50. NAB Reply Comments, MB Docket No. 09-182, at 12-13 & Att. A, BIA/Kelsey, *Reforming Local Ownership Rules: Station and Market Analyses* (Apr. 17, 2012). A more recent NAB analysis using Nielsen ratings data shows that in 80 of the 157 markets that had four or more full-power commercial stations, the combination of the all-day audience share of the third- and fourth- rated stations is less than the top-rated station. NAB Comments at 52 & n. 160 (noting that in a small number of these 157 markets, a low power or Class A station is among the top-four rated, showing that blanket assumptions about local market structures across DMAs may be in error). See also *id.* at 51-54 & Att. B, BIA/Kelsey, *Local Television Station Revenue Share Analysis: An Update* (July 23, 2014).

²⁶ The FCC also had no basis for completely disregarding NAB’s empirical evidence about the revenue shares of top-four stations. See Order at ¶ 43. As NAB explained, revenue data is highly relevant to competition analysis. NAB Comments at 51-52. The fact that the FCC bases its top-four restriction in

NAB again urges the FCC to eliminate the top-four restriction and permit common ownership of two of the top-four rated stations in any local market. *Id.* at 4-6. In the context of unprecedented competition for viewers and advertisers from multichannel, mobile and online providers, more limited FCC regulation, coupled with antitrust oversight, would be sufficient to maintain healthy competition and allow local stations to achieve economies of scale and scope vital to local service.

II. ATTRIBUTING TELEVISION JSAs, THEREBY TIGHTENING THE LOCAL TV OWNERSHIP RULE, IS BOTH CONTRARY TO STATUTE AND ARBITRARY AND CAPRICIOUS

To justify the attribution of JSAs, the FCC needed to show that tightening the local TV rule served the public interest. As the Third Circuit Court of Appeals concluded, attribution of TV JSAs “modifies” the ownership rules “by making them more stringent,”²⁷ and Section 202(h) requires that any decision to “retain, repeal, or modify” the rules must be done “in the public interest” and supported “with a reasoned analysis.”²⁸ The retention of the existing local TV rule while attributing JSAs thus does not maintain the status quo, as the Order implies,²⁹ but makes the rule “more stringent” – and accordingly requires a showing under 202(h) that the modified rule is in the public interest as the result of competition. The Order, however, offers *no* rationale for tightening the local TV rule, let alone the requisite “reasoned analysis.” Indeed, it rejected as unjustified arguments made for “tightening” the current numerical limits of the TV rule. Order at ¶ 38 (noting the “tangible public interest benefits for viewers” from

terms of audience share does not make other evidence about competition among local TV stations automatically irrelevant, even if the FCC finds it inconvenient.

²⁷ *Prometheus III*, 824 F.3d at 62-63 (attributing JSAs “expand[s] the reach of the ownership rules”).

²⁸ *Id.* at 62, quoting *Prometheus I*, 373 F.3d at 395.

²⁹ See Order at ¶ 64 (decision to attribute JSAs does not change FCC’s determination that the “existing” local TV rule “should be retained”).

local TV station combinations). Particularly in light of that conclusion, tightening the local TV rule via JSA attribution is not only contrary to Section 202(h), but also violates the 1934 Act. As NAB previously explained, the FCC’s rulemaking power, including its authority under Title III to adopt ownership rules, are “confined to promulgation of regulations that serve the public interest,” and the FCC “is statutorily bound to determine” whether the “vital link between [its] regulations and the public interest” exists.³⁰

Even beyond violating statutory requirements by adopting a more expansive local TV rule without showing it serves the public interest, the decision to attribute JSAs involving more than 15% of a station’s weekly advertising time is arbitrary and capricious. See July 29 *Ex Parte* at 2-4. As Commissioner Pai noted, 31 FCC Rcd at 10055, the Order fails to cite actual evidence supporting its decision – not even a single example where a JSA enabled a station to exercise undue influence over another station or influenced a single programming decision. And while citing no evidence of competitive or other harm from TV JSAs, the Order does not contest JSAs’ myriad benefits established in the record, especially in smaller markets.³¹ A decision running “counter to the evidence before the agency” and lacking a “rational connection between the facts found and the choice made” is arbitrary and capricious.³²

The Order also is wholly inconsistent with other recent FCC decisions on attribution, which permitted arrangements that confer far more influence (and even control) than joint ad sales. In the wireless context, the FCC determined that an entity leasing 100% of its spectrum

³⁰ *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (citing Section 303(r) of the Act). See July 29 *Ex Parte* at 5-6 (discussing this point in detail, citing additional cases and observing that a valid public interest analysis must include consideration of the benefits of JSAs).

³¹ See, e.g., NAB *Ex Parte* Submission, MB Docket Nos. 09-182, *et al.*, at 11-16 (Mar. 21, 2014); NAB Notice of *Ex Parte* Communication, MB Docket No. 09-182 (Feb. 18, 2014).

³² *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

from third parties would not be unduly influenced by the lessors and could be deemed in full control of their businesses.³³ These decisions cannot be reconciled with a *per se* determination to treat any TV broadcaster that allows another station to sell over 15% of its *advertising time* as being owned by that station – and the FCC makes no effort to do so. Such blatantly inconsistent regulatory treatment is arbitrary and capricious.³⁴ NAB accordingly urges reconsideration and reversal of the TV JSA decision.

III. THE FCC SHOULD REVERSE OR SIGNIFICANTLY NARROW ITS DECISION REQUIRING DISCLOSURE OF A VIRTUALLY UNLIMITED RANGE OF STATION AGREEMENTS

The FCC should reconsider its vastly overbroad and unnecessary mandate that TV stations disclose virtually all sharing agreements made with other stations, whether in the same market or different markets, and no matter how minor and how far removed from core station operations. This new rule epitomizes disclosure for the sake of disclosure, which is not a valid regulatory purpose. See NAB Comments at 95-99; 101-103. The Order fails to identify specific public interest harms that the rule would alleviate, and does not demonstrate a need for the disclosure of all SSAs concerning “any station-related services,” which would evidently encompass everything from janitorial to catering to maintenance to security services. Order at ¶ 349 (defining SSAs subject to new rule). Unsurprisingly, the Order fails to show that sharing agreements for the provision of such routine services or other administrative, technical and support services implicate the interests of the viewing public.

The FCC identifies only vague “potential impacts” on its policy goals as justification for disclosure (a frequent precursor to further regulation, as Commissioner O’Rielly noted in his

³³ *Grain Mgmt., LLC’s Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission’s Rules*, 29 FCC Rcd 9080, ¶¶ 13-14 (2014); *Updating Part 1 Competitive Bidding Rules*, 30 FCC Rcd 7493, ¶ 25 (2015). NAB’s July 29 *Ex Parte* discusses these cases in more detail.

³⁴ See, e.g., *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 968-70 (D.C. Cir. 1999) (finding FCC decision arbitrary and capricious where it failed to explain its disparate treatment of licensees).

dissent), as well as other concerns, like “job losses,” which are far outside the FCC’s statutory charge. Order at ¶ 354. Given the sweeping definition of SSAs adopted, the Order simply makes no effort to identify the core operating functions which, if provided pursuant to an agreement, might reasonably be expected to allow one station to influence another in areas implicating the FCC’s goals. For these reasons and those in our comments, NAB requests the FCC to reconsider its SSA disclosure requirement, and either eliminate it or, at the least, rationally define the SSAs subject to it.

IV. THE FCC IMPROPERLY RETAINED ITS DECADES-OLD NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN AND RADIO/TELEVISION CROSS-OWNERSHIP RULE

The Order retains the newspaper/broadcast cross-ownership ban and the radio/TV cross-ownership rule, finding them necessary to promote viewpoint diversity. These decisions are arbitrary and capricious and contrary to Section 202(h) because they ignore the realities of the digital media marketplace and how Americans obtain news and information today; virtually abandon the FCC’s localism goal by disregarding the extensive localism benefits of both types of cross-ownership and the localism harms stemming from the print newspaper industry’s dire condition; apply an irrational double standard in analyzing the sources that contribute to viewpoint diversity; and fly in the face of past FCC conclusions about the very limited contributions of radio to viewpoint diversity. The Order even fails to establish that diverse ownership produces the viewpoint diversity that is the sole justification for the two rules. The FCC must reconsider and reverse its decisions to retain these analog-era rules.

A. The Order Provides No Evidence that the Cross-Ownership Rules Produce Viewpoint Diversity, While They Clearly Harm Localism

Because viewpoint diversity remains the only justification for both cross-ownership rules, the Order’s failure to establish, rather than assume, that the ownership of media outlets significantly influences their viewpoint is a fatal flaw. The Order never seriously

addresses, let alone refutes, substantial record evidence that ownership does not drive viewpoint.³⁵ Instead, the Order (at ¶ 144) merely asserts that an owner has “the opportunity, ability, and right to influence the editorial process of media outlets it owns, regardless of the degree to which it exercises that power.” Under this fact-free standard, even the theoretical “possibility of a connection between ownership and viewpoint,” *id.*, will always be sufficient to regulate all outlets on diversity grounds as though there were in fact a proven connection. But the Order cites *no evidence* of a connection between ownership and viewpoint; relies solely on previous (and similarly unsupported) FCC statements that it cannot absolutely rule out the possibility of such a connection, *id.*; and even concedes the near impossibility of designing a study to establish such a connection.³⁶ Retention of both cross-ownership rules on diversity grounds is therefore arbitrary and capricious and contrary to the FCC’s § 202(h) obligation to retain only those rules necessary in the public interest.³⁷

Beyond flatly failing to establish that the cross-ownership rules produce the benefits of viewpoint diversity, it is undisputed that these rules harm localism.³⁸ In light of this evidence

³⁵ See, e.g., NAB Comments at 79-83 & Att. C (providing an illustrative list of 15 studies, including several commissioned by the FCC, finding that factors other than separate ownership (especially consumer preferences) drive viewpoint diversity on media outlets); Comments of Newspaper Association of America, MB Docket Nos. 14-50, *et al.*, at 15-18 (Aug. 6, 2014) (2014 NAA Comments); Comments of NAA, MB Docket No. 09-182, at 18-20 (Mar. 5, 2012) (2012 NAA Comments).

³⁶ Order, at ¶ 308 & n. 944 (the FCC “has identified a number of issues that significantly impede study of the connection between ownership and viewpoint diversity” including, *inter alia*, the “lack of a reliable measure of viewpoint”).

³⁷ See NAB Comments at 3-8, 79 (requiring commenters to prove that viewpoint diversity can *never* be influenced by ownership establishes an improperly high bar under the APA and § 202(h)); *Kristin Brooks Hope Ctr. v. FCC*, 626 F.3d 586, 589-90 (D.C. Cir. 2010) (vacating decision as arbitrary and capricious where FCC set a standard so “curiously high” that no party “could ever satisfy” it).

³⁸ Numerous studies have found that common ownership of a broadcast station and a printed newspaper in the same market increases the amount and quality of the local news and other non-entertainment programming offered by the station. See, e.g., NAB Comments at 74-76; 83 (identifying 15 studies concerning newspaper/TV and two studies addressing newspaper/radio cross-ownership); 2012 NAA Comments at 13-15 (discussing survey of NAA members showing that cross-owned stations

and the perilous state of the print newspaper industry, the FCC should not retain any rule impeding local news production and potential investment in newspapers.³⁹

B. The Order Ignores the Realities of the Digital Media Marketplace

Even assuming *arguendo* that ownership has some potential to influence an outlet's viewpoint, the FCC can and should determine that the proliferation of information sources and dramatic changes in the ways consumers access and interact with news and information has obviated the need for the cross-ownership rules. Because consumers today have nearly ubiquitous access to a multitude of voices,⁴⁰ restrictions uniquely burdening broadcast stations and print newspapers are unjustified. The Order's conclusion that outlets other than print newspapers and broadcast stations make little or no contribution to viewpoint diversity in local markets reflects willful blindness to the transformation of the media marketplace and a failure to consider updated evidence in the record.⁴¹

provide more news, public affairs and other informational programming than non-cross-owned stations in the same market); 2014 NAA Comments at 2-10. Similarly, at least five studies have shown that radio/TV cross-ownership produces localism benefits, including greater amounts of news and public affairs programming. See, e.g., NAB Comments at 85-86 & n. 290-291. To disregard this unrefuted evidence, the Order (at ¶ 162) essentially abandons localism as a goal, and again sets a "curiously high" bar to discount cross-ownership's localism benefits. See n. 37, *supra*.

³⁹ See, e.g., July 7 *Ex Parte* at 2-6; NAB Comments at 35-37; 2012 NAA Comments at 4-12 (detailing the financial and competitive struggles of the newspaper industry and their harm to local journalism). In stark contrast to the 2006 quadrennial review, the Order (at ¶ 167) ignores unchallenged evidence of the industry's struggles and their direct connection to rapid declines in newsroom employment.

⁴⁰ See, e.g., NAB Comments at 9-31; July 7 *Ex Parte* at 6-11; July 15 *Ex Parte* at 1-3; Comments of Tribune Co., MB Docket No. 09-182, at 1-3, 24-28 (Mar. 5, 2012).

⁴¹ The fact that online news and information outlets have not replaced or entirely supplanted broadcast stations or print newspapers as news sources does not permit the FCC to ignore the remarkable diversity of information and expression that online sources bring to every local market in the country. See, e.g., NAB Comments at 6, 63. The Order's conclusion (at ¶ 148) that it cannot count "the contributions of cable, satellite, and Internet sources" of news and information because they "serve as a supplement, but not as a substitute" for local news and information provided by print newspapers and broadcast stations is, again, unsubstantiated.

The Order affirms, for example, that “traditional news providers, and their affiliated websites, continue to be the most relied-upon sources of local news and information,” citing the FNPRM, which noted that 78% of Americans obtain news from local television stations on a typical day.⁴² Not only was this highly selective data five years old at the time of the FNPRM – making it seven years old today⁴³ – but also the FCC ignores updated information available and cited by commenters in this proceeding. A Pew report discussed by NAB shows that digital news sources are closing the gap with local television and have surpassed radio and newspapers.⁴⁴ Today, Americans “often” get news from local television (46%), digital sources (38%), radio (25%) and print newspapers (20%),⁴⁵ with much steeper declines in print and broadcast media reliance among consumers under the age of 50.⁴⁶ Numerous other studies

⁴² Order at ¶¶ 147-48 & n. 385 (citing FNPRM at ¶ 130 (which cites *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, Steven Waldman and the FCC Working Group in Information Needs of Communities, at 84 (June 2011) (*Information Needs of Communities Report*)).

⁴³ *Id.* The *Information Needs of Communities Report*, in turn, refers to a 2010 Pew Research Center report, which was based on surveys conducted as long ago as 2009. While that earlier Pew report did find high reliance on local TV stations for news, it also found, on a typical day, that 61% of Americans got some kind of news online and that 92% of American adults got news from multiple platforms, with 46% obtaining news from *four to six* different platforms and only 7% getting news from a single platform. Pew additionally reported in 2010 that the advent of social media and blogs had helped the news become a social experience in fresh ways for consumers, and that people used social networks to filter, assess and react to news. K. Purcell, L. Rainie, A. Mitchell, T. Rosenstiel and K. Olmstead, Pew Research Center, *Understanding the Participatory News Consumer*, Overview (Mar. 1, 2010).

⁴⁴ See, e.g., July 15 *Ex Parte* at 1 (citing Pew Research Center, *State of the News Media 2016* at 45 (June 15, 2016)) (*State of the News Media 2016*).

⁴⁵ *State of the News Media 2016* at 45. Print newspapers also have declined dramatically as sources of political and campaign news, while online sources have grown in importance. See, e.g., July 7 *Ex Parte* at 10-11 (citing J. Gottfried, M. Barthel, E. Shearer and A. Mitchell, Pew Research Center, *The 2016 Presidential Campaign – a News Event That’s Hard to Miss*, at 1-2 (Feb. 4, 2016); *State of the News Media 2016* at 45).

⁴⁶ NAB *Ex Parte* Letter from Rick Kaplan, MB Docket Nos. 14-50, *et al.*, at 2 (July 18, 2016) (July 18 *Ex Parte*) (citing A. Mitchell, J. Gottfried, M. Barthel and E. Shearer, Pew Research Center, *The Modern News Consumer*, at 4 (July 7, 2016) (only 5% percent of those aged 18-29, and 10% of those aged 30-49, often obtain news from print newspapers, while among these two groups, 50% and 49%, respectively, often obtain news online from social media, websites and apps)).

have similarly found that younger demographic groups rely more heavily on social media and other online outlets, rather than any traditional media including local TV, to obtain news and information, including political.⁴⁷ In fact, the use of social media as a news source has grown quickly and across all age groups such that today 62% of *all* U.S. adults obtain news via social media.⁴⁸ Section 202(h) obligates the FCC to consider such evidence.⁴⁹

Beyond relying on outdated information contrary to § 202(h)'s requirement of a “fresh look” at the ownership rules, *Prometheus I*, 373 F.3d at 391, the Order also relies on data that does not support the FCC's position. The Order cites a Knight Foundation report in concluding that “[l]ocal television continues to dominate” as a source of news.⁵⁰ That report, however, was based on a survey that did not distinguish between local news and other news or between broadcast TV and other forms of TV.⁵¹ Survey participants reporting reliance on “television news” likely could have been referring to cable or broadcast network national news, regional cable networks, local TV stations or any combination of these. The *News Goes*

⁴⁷ See, e.g., July 7 *Ex Parte* at 9-10 (citing The Media Insight Project, *How Millennials Get News: Inside the Habits of America's First Digital Generation* at 5, 12 (Mar. 2015); Pew Research Center, *Millennials & Political News: Social Media – the Local TV for the Next Generation?* (June 1, 2015)).

⁴⁸ July 7 *Ex Parte* at 9 (citing Jeffrey Gottfried and Elisa Shearer, Pew Research Center, *News Use Across Social Media Platforms 2016*, at 2 (May 26, 2016)).

⁴⁹ Commenters cited by the Order (at ¶¶ 142, 151-52) supporting retention of the cross-ownership rules similarly rely on outdated evidence and anecdotes. See, e.g., Comments of Free Press, MB Docket Nos. 14-50, *et al.*, at 9-14 (Aug. 6, 2014) (urging FCC to ignore internet news sources, citing July 2009 data); Comments of National Hispanic Media Coalition, MB Docket Nos. 14-50 *et al.*, at 6-11 (Aug. 6, 2014) (NHMC Comments) (citing anecdotes about the role radio played in organizing immigration actions in 2006, but failing to explain how cross-ownership of radio stations would have diminished this role or what role the internet would play today).

⁵⁰ Order at ¶ 148 & n. 388, 393 (emphasis added) (citing Knight Foundation, *Part One – News Goes Mobile: How People Use Smartphones to Access Information* (2016)) (*News Goes Mobile*).

⁵¹ *News Goes Mobile* at 18. The survey defined “news” very broadly to include “current events happening somewhere, which could include a range of topics, such as world, U.S., technology, sports, entertainment, etc.,” so it explicitly was *not* limited to local news. See also July 7 *Ex Parte* at 8-9 (noting that *News Goes Mobile* included “all TV, not just broadcast” in defining “television”).

Mobile report accordingly cannot support FCC arguments about consumer reliance on local TV stations and their news.⁵² To the contrary, this report focused primarily on skyrocketing use of smartphones to access and share news via internet websites, social media and applications, providing yet more evidence of consumer reliance on information sources beyond print newspapers and broadcast stations.⁵³

In asserting that much of the news accessed via the internet has a broadcast station or print newspaper as its origin, Order at ¶¶ 147-48, the FCC again ignored record evidence, as online outlets unaffiliated with broadcast or print media have proliferated. The Order disregards a Pew Research Center report examining local media usage in markets of various sizes, which found as many as 143 news sources in Denver, Colorado, of which 25 were “digital-only outlets” having no connection to “legacy organizations based in print or television.”⁵⁴ Outlets that are “digital-born” or “digital natives” are experiencing rapid growth—and they have a tendency to be local or even hyperlocal.⁵⁵ The FCC similarly erred in ignoring the exponential increase in diverse viewpoints due to the rise of citizen journalism and user-generated content; the ability to access news and information directly from the source (e.g.,

⁵² The D.C. Circuit previously rejected an FCC attempt to rely on a study, which did not exclusively focus on local news on broadcast TV stations, for an ownership order’s conclusions about Americans’ primary source of local news and the exclusion of media other than broadcast TV stations from its local TV rule “voice” test. *Sinclair*, 284 F.3d at 163-65.

⁵³ July 7 *Ex Parte* at 8-9 (citing *News Goes Mobile* at Fig. 11) (survey shows use of social media far outpaces use of print newspapers as a source of news).

⁵⁴ July 15 *Ex Parte* at 2 (citing Pew Research Center, *Local News in a Digital Age* (Mar. 5, 2015). Even small markets, such as Macon, GA and Sioux City, IA, have as many as 24 and 31 separate news sources, respectively. *Id.* See also NAB Notice of *Ex Parte* Communication from Rick Kaplan, MB Docket Nos. 14-50 *et al.* (July 8, 2016) at Attachment, p. 6 (documenting numerous local news sources in Washington, DC); Tribune 2010 NPRM Comments at 1-3; 24-28 (identifying local independent news websites and other sources in several markets); NAB Comments at 26-27.

⁵⁵ July 15 *Ex Parte* at 2 (citing 2014 Pew Research Center survey of 438 small digital native news sites, which showed that more than half focused primarily on local news).

political campaigns, government entities, office holders) without the intermediation of any media outlets; and the rapid decline of traditional media's ability to act as "gatekeepers" of information.⁵⁶ The growing agenda-setting power of social media, which influences both the traditional media's agenda and the public's agenda,⁵⁷ directly undermines the FCC's outdated and unexamined belief in the supremacy of print newspapers and broadcast stations as information sources in the internet age.

Notably, several parties who urged the FCC to disregard the internet's impact on access to news and information⁵⁸ have frequently commented elsewhere on the internet's importance to freedom of speech and the sharing of news, information and diverse ideas.⁵⁹ Given that the FCC itself found that the internet has had a significant impact on the way people get, share and create news, engage in political activities, interact with government and

⁵⁶ See, e.g., July 15 *Ex Parte* at 2 (citing, *inter alia*, Pew Research Center, Project for Excellence in Journalism, *The State of the News Media 2006* at Overview (recognizing a decade ago a "seismic transformation in what and how people learn about the world," as power moved "away from journalists as gatekeepers over what the public knows" and citizens assumed "a more active role as assemblers, editors and even creators of their own news"); NAB Comments at 17-33; Comments of Tribune Company, MB Docket No. 09-182, at 28-44 (Mar. 5, 2012)).

⁵⁷ See, e.g., NAB Comments at 28-29; July 15 *Ex Parte* at 3 (citing Susan Jacobson, "Does Audience Participation on Facebook Influence the News Agenda? A Case Study of The Rachel Maddow Show," 57 *J. Broadcasting & Electronic Media* 338, 349-51 (Sept. 2013); D.Y. Wohn and B.J. Bowe, *Micro Agenda Setters: The Effect of Social Media on Young Adults' Exposure to and Attitude Toward News*, *Social Media + Society* 1, 11 (Jan.-Mar. 2016); T. Kim, D.J. Atkin, and C.A. Lin, *The Influence of Social Networking Sites on Political Behavior: Modeling Political Involvement via Online and Offline Activity*, 60 *J. Broadcasting & Electronic Media* 23, 34-35 (Mar. 2016)).

⁵⁸ See, e.g., *Ex Parte* Letter from Cheryl Leanza, UCC, MB Docket Nos. 14-50, *et al.* (June 28, 2016) (documenting FCC meeting involving UCC, Free Press, NHMC and Common Cause).

⁵⁹ See, e.g., Todd O'Boyle, "Net Neutrality is a Democracy Issue," CommonCause.org (Sept. 10, 2014) ("[t]he Internet is the cornerstone of 21st century democracy – it's how we learn about and debate the issues of the day"); Comments of NHMC, GN Docket No. 09-191, at 7 (Jan. 14, 2010) ("[t]he Internet turns content consumers into content creators, allowing online dialogue to be more diverse than ever seen before in the public square or on any other media platform").

organize in communities,⁶⁰ it was arbitrary and capricious to ignore the internet in this proceeding. On reconsideration, the FCC should acknowledge the internet's transformative effects do not disappear in the context of broadcast ownership rules.

C. The Order Fails to Justify its About-Face With Regard to Radio's Contribution to Viewpoint Diversity

The Order presents no basis for reversing – in the context of both the newspaper/radio and radio/TV cross-ownership rules – the FCC's long-established position that radio stations make only limited contributions to local viewpoint diversity. The Order's sudden determination that radio now plays a meaningful role in providing viewpoint diversity in local markets directly contradicts past FCC decisions, evidence in the record and the Order's analysis of the viewpoint diversity provided by the internet and other non-broadcast sources. Because radio's alleged contribution to diversity in local markets was the only basis for retaining the newspaper/radio and radio/TV cross-ownership rules, their retention is arbitrary and capricious and contrary to Section 202(h).⁶¹

The entire history of and the record in this proceeding do not support the Order's abrupt reversal of the FCC's long-standing view of radio's role in the media marketplace. The 2010 NPRM sought comment on eliminating the newspaper/radio cross-ownership ban, observing that radio stations are not the primary outlets contributing to viewpoint diversity in local markets and that a substantial amount of news and talk programming on radio stations

⁶⁰ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5573 (2014) (Open Internet NPRM).

⁶¹ An "agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so." *Wisc. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001); accord *State Farm*, 463 U.S. at 42-43.

is nationally syndicated, rather than locally produced.⁶² The FNPRM agreed that consumers mainly rely on other outlets for local news and information,⁶³ observing that the FCC has repeatedly “recognized since at least 1970” that radio plays a less significant role in promoting viewpoint diversity. FNPRM at ¶ 147. With regard to the radio/TV cross-ownership rule, the NPRM (at ¶ 119) tentatively concluded that the rule was no longer “necessary to promote the public interest,” citing studies showing that radio/TV combinations did not reduce the amount or diversity of local news available to consumers. *Id.* at ¶¶ 123-32. The FNPRM again sought comment on record evidence suggesting that the rule did not promote viewpoint diversity.⁶⁴ Submissions responding to the FNPRM affirmed the FCC’s past findings with regard to both the newspaper/radio and radio/TV restrictions.⁶⁵

The Order, however, unjustifiably reverses course, concluding that radio contributes to viewpoint diversity to an extent sufficient to maintain both radio cross-ownership restrictions. In so doing, the FCC ignores its earlier findings (see, e.g., n. 63, *supra*, discussing FNPRM at ¶ 146), relies on questionable older data and makes illogical arguments, and cites just two commenters who opposed any rule changes. For example, the Order points to a report that

⁶² 2010 NPRM, 26 FCC Rcd at 17529-30, ¶ 112. The court in *Prometheus III*, in discussing the costs from retaining the newspaper cross-ownership ban, expressly noted the FCC’s previous proposal to “leav[e] radio/newspaper combinations unregulated.” 824 F.3d at 51.

⁶³ FNPRM at ¶¶ 144-49. The FNPRM, at ¶ 146, cited findings that consumers’ reliance on radio news has declined steadily over the past two decades; that only 30 of the 11,000 commercial stations are all-news radio; that radio stations in most cities “do not provide much local journalism;” that the vast majority of news-talk radio is nationally syndicated and has “done little for traditional local radio news”; and that only one employee is involved in news output at median-sized stations.

⁶⁴ FNPRM at ¶ 211 (noting that no commenter, despite the FCC’s earlier specific request, had submitted studies showing that the radio/TV cross-ownership rule promotes viewpoint diversity or that elimination of the rule would harm it).

⁶⁵ See, e.g., NAB Comments at 83-88; July 7 *Ex Parte*; July 15 *Ex Parte*; Comments of Morris Communications Company, LLC, MB Docket Nos. 14-50 *et al.* (Aug. 6, 2014); Comments of Bonneville International Corp. and Scranton Times, L.P., MB Docket Nos. 14-50 *et al.* (Aug. 6, 2014).

33% of Americans listened to news radio yesterday.⁶⁶ But that data comes from a Pew study published in 2013, and multiple updates since have shown notably less usage of radio as a news source.⁶⁷ Highlighting the outdated 33% figure also obscures the larger point of the 2013 report, which showed daily radio news listening “down considerably from 43% in 2000 and 52% in 1990.” *Digital Drives*. The Pew study, moreover, did not exclusively analyze “local” news, and acknowledged that most stations offering news/talk formats offer nationally syndicated content, “removing the local component from the conversation.” *Id.*

Whether an outlet offers *local* news, however, is the touchstone of the Order’s viewpoint diversity analysis and its primary excuse for excluding the internet’s contributions to diversity. Order at ¶¶ 135, 142, 148. By contrast, nearly every example the FCC relies upon to purportedly show that radio provides viewpoint diversity involves national rather than local issues.⁶⁸ If the internet and social media do not contribute to viewpoint diversity because they

⁶⁶ Order at ¶ 151 (citing UCC Comments at 33-35). UCC cited Laura Santhanam *et al.*, Pew Research Center, *Audio: Digital Drives Listening Experience* (2013) (*Digital Drives*).

⁶⁷ See, e.g., July 15 *Ex Parte* at 1 (citing *State of the News Media 2016*) (only 25% of Americans now name radio as a source often used for news). The Order also states that “there is some evidence in the record that members of certain communities may rely more heavily on broadcast radio stations for local news and information,” noting that “more than half of Latinos regularly turn to radio for at least some of their news.” Order at ¶ 156 (citing NHMC Comments at 7-8, which in turn cites Mark Hugo Lopez, *et al.*, *A Growing Share Of Latinos Get Their News In English* (Pew Research Hispanic Trends Project, 2013) (*Pew Latino News Study*)). But rather than providing evidence of heavy reliance on radio, the study cited by NHMC concludes that “[r]adio news media and print newspapers have seen the biggest declines in use among Latino adults.” *Pew Latino News Study*.

⁶⁸ For instance, UCC cites examples of programming on stations, including music stations, that it claims “express[] editorial viewpoint,” but many are not about local issues. Order at ¶¶ 151, 156 (citing UCC Comments at Appendix D). To obtain and compile its anecdotes, UCC reviewed stations’ websites. While the topics identified are wide-ranging, they rarely mention local news, and at least one of UCC’s cited programs, *The Russ Parr Morning Show*, is nationally syndicated. UCC Comments at 35-39 & App. D. Similarly, NHMC’s discussion of Latino radio stations mobilizing attendance at immigration rallies across the country in 2006 was a response to proposed federal legislation, rather than state legislation or any local event, and statements that radio stations played a role prior to the 2008 presidential election again involve a national event. See Order at ¶¶ 152, 157. And usage data from surveys that did not ask specifically about radio’s local news role provide nothing credible about radio’s contribution to diversity of local issues. See Order at ¶ 155 (citing American Press Institute, *The Personal News Cycle* at 1-4 (2014)) and Order at ¶ 151 (citing *Digital Drives*).

are not sufficiently “local,” then the FCC cannot logically rely on examples of material aired by radio stations about national issues, or listener reliance on radio for non-local information, to support its conclusion that radio stations contribute to viewpoint diversity in local markets.

The Order’s illogical discounting of the internet is also shown by its finding, at ¶ 158, that radio stations contribute to viewpoint diversity by providing an “additional opportunity for civic engagement.” If platforms that promote civic engagement contribute to viewpoint diversity, then the existence of the internet – the greatest platform in history for engagement between individuals and groups with each other and with community organizations, political candidates, government officials and myriad others – makes broadcast ownership restrictions based on diversity concerns wholly unjustifiable. The Order visibly strains when it cites as an example of radio’s provision of diverse local information a call-in radio program, which “offer[s] local residents unique opportunities to participate interactively in a conversation about an issue of local concern.” *Id.* at ¶ 157. But radio obviously is not “unique” in offering a platform for interactivity, and it is arbitrary and capricious for the FCC to count one interactive platform as contributing to diversity while discounting online platforms.

The Order’s contradictions are perhaps best illustrated by its unjustifiable refusal (at ¶ 148) to consider the meaningful contributions of the internet, cable or satellite to viewpoint diversity because they are not complete “substitute[s]” for, but only “supplement[s]” to, the local news and information provided by broadcast TV or print newspapers. This same inappropriately high standard is not applied to radio, however, as the Order, at ¶ 154, merely asserts that a “lesser role does not mean that radio plays no role” in the availability of diverse viewpoints.

In light of the Order’s illogic and self-contradictions; the explosion of digital sources of news and information; the lack of empirical evidence that the cross-ownership rules promote,

or that their repeal would decrease, viewpoint diversity; and the harm these rules cause to localism, the FCC must reconsider and eliminate them.

V. THE FCC SHOULD ADOPT AN INCUBATOR PROGRAM TO PROMOTE DIVERSITY

The FCC should reconsider its rejection of an NAB proposal to create an incubator program. See, e.g., NAB Comments at 92-93. In defining eligibility for such a program, the FCC could test the feasibility of the proposed overcoming disadvantages preference, which the FCC declined to adopt in the Order (at ¶ 306), or could utilize the well-established “new entrant” concept from the broadcast services’ auction rules.⁶⁹ Adopting an incubator program would not only provide a practical method for increasing ownership diversity, but also would respond more affirmatively to the Third Circuit’s concerns in the *Prometheus* cases.⁷⁰

VI. CONCLUSION

For the foregoing reasons, the FCC should grant NAB’s petition for reconsideration.

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⁶⁹ Under these rules, entities without attributable interests in other media of mass communications qualify for bidding credits in auctions for broadcast licenses. 47 C.F.R. §§ 73.5007, 73.5008. Using this definition of “new entrant” for an incubator program would result in new owners entering the broadcast industry. See, e.g., NAB Comments, MB Docket Nos. 06-121, *et al.*, at 6 (Oct. 1, 2007) (discussing in 2006 quadrennial the use of new entrant concept as a way to promote diversity).

⁷⁰ Rather than merely reinstating a revenue-based standard that the court has already rejected, *Prometheus Radio Project v. FCC*, 652 F.3d 431, 470-472 (2011), implementation of an incubator program with a more targeted eligibility standard would show through concrete action the FCC’s commitment to boosting diversity of ownership.