

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

In the Matter of)	
)	
2010 Quadrennial Regulatory Review –)	MB Docket No. 09-182
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (“NAB”)¹ files these comments in response to the public notice² regarding the upcoming quadrennial review of Federal Communications Commission (“FCC” or “Commission”) rules governing broadcast ownership.³ In the *Notice*, the Bureau announced the agenda and participants for an

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

² *Media Bureau Announces Agenda and Participants for Initial Media Ownership Workshops and Seeks Comment on Structuring of the 2010 Media Ownership Review Proceeding*, Public Notice, MB Docket No. 09-182, DA No. 09-2209 (rel. Oct. 21, 2009) (“*Notice*”).

³ As stated in the *Notice*, the Commission’s statutorily required periodic review encompasses five ownership rules: (1) the newspaper/broadcast cross-ownership rule, (2) the radio/television cross-ownership rule, (3) the local television ownership rule, (4) the local radio ownership rule, and (5) the dual network rule. *Notice* at 1 (citing 47 C.F.R. § 73.3555). For the local television ownership rule, the radio/television cross-ownership rule, and the newspaper/broadcast cross-ownership rule that are currently in effect, see 47 C.F.R. § 73.3555(b)-(d) (2002); for the local radio ownership rule, see 47 C.F.R. § 73.3555(a). The dual network rule is contained in 47 C.F.R. § 73.658(g).

initial series of workshops concerning the 2010 Quadrennial Review and asked a series of questions regarding the general scope and framework of the review, the Commission's competition, diversity, and localism goals, and the appropriate data-gathering and studies to undertake in connection with the review. The comments below augment the presentation made on behalf of NAB during the workshops.⁴

In our comments, NAB recommends that, in light of the complexity of the quadrennial review, the Commission should focus exclusively on the five rules that are required to be considered as part of that review in this proceeding. We discuss the benefits of bright line rules as compared with case-by-case review, noting that waivers may also be appropriate in certain circumstances. We discuss the public policy goals that should govern the Commission's examination of its broadcast ownership rules. In particular, NAB believes that the Commission's review should be guided by the basic principle that the public interest is best served by permitting broadcasters to compete effectively in the multi-platform, multichannel digital media marketplace. Establishing a paradigm that permits effective competition will promote the policy goals of diversity and localism.

NAB also discusses the analytical framework for the Commission's analysis of these rules, which is found in the Section 202(h) of the Telecommunications Act of 1996 and the cases interpreting it. Under that framework, the FCC must take current competitive conditions into account as it reviews the broadcast ownership rules. Finally, we discuss the types of data-gathering and studies needed to ensure that the

⁴ These comments supplement the presentation of Jane E. Mago, NAB's Executive Vice President and General Counsel made at the ownership workshop held on November 4, 2009. A copy of Ms. Mago's workshop statement is attached hereto as Appendix A.

Commission's revised rules will be based on current, realistic data that fully accounts for the impact that new media sources have on broadcast stations and the audiences they serve.

II. DISCUSSION

A. General Scope and Framework

The *Notice* asks whether, in addition to the rules that the Commission is statutorily required to consider in its quadrennial review, there are other rules or issues that it should address in this proceeding.⁵ With regard to the specific rules that should be considered, NAB believes that the Commission should address only the five rules that are required by statute to be considered in connection with the quadrennial review in this proceeding. The complexity of the task before the Commission already places a heavy burden upon it. Rarely are so many rules involved in a single proceeding. Further complicating the Commission's task is the pendency of petitions for reconsideration of previous revisions to its ownership rules, pending litigation concerning the rules,⁶ and two remands of one of the rules.⁷ Review of the five

⁵ *Notice* at 2.

⁶ See *Media General Inc., et al. v. FCC*, Case Nos. 08-4460 *et seq.* (3rd Cir. 2008).

⁷ The current local television ownership rule, adopted in 1999, was found arbitrary and capricious and remanded to the Commission in 2002. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The rule was revised by the Commission in 2003, but the revisions were stayed and later remanded to the Commission in 2004. *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (3rd Cir. 2004). In the most recent ownership rule review, the Commission elected to retain the same limits that were remanded in *Sinclair v. FCC*. *In the Matter of 2006 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*, 23 FCC Rcd 2010 (2007).

broadcast ownership rules and adoption of revisions that will withstand judicial review will be no small feat.

Moreover, to the extent that adding issues and topics would delay the review, such additions would not serve the public interest. Completing the review promptly in order to bring the rules up-to-date to reflect current marketplace conditions is critical to the ability of broadcasters to attract capital, remain competitive with other media outlets, and provide local service to the public. For these reasons, NAB believes that the public interest is best served by the Commission maintaining a focus on the five rules that are required by statute to be reviewed in 2010.

The *Notice* also inquires as to the general approach the Commission should take in revising its ownership rules. In particular, the *Notice* asks whether the Commission should have “bright line rules or a more case-by-case approach guided by a policy statement.”⁸ NAB believes that the vast majority of proposed media transactions can be addressed using bright line standards. As the Commission has observed, bright line rules provide greater certainty and predictability for broadcasters, prospective new entrants, investors, and other parties monitoring and analyzing the media marketplace.⁹ Such certainty and predictability serves the public interest by reducing transaction costs (thereby allowing broadcasters to maximize focus on serving the needs and interests of

⁸ *Notice* at 2.

⁹ See, e.g., *In The Matter of Promoting Diversification of Ownership in The Broadcasting Services*, 23 FCC Rcd 5922, 5937 (2009) (bright line attribution rules create “regulatory certainty for entities in planning their financial transactions, an important goal of the ... rules”); *In The Matter of The Commission's Cable Horizontal and Vertical Ownership Limits*, 23 FCC Rcd 2134, 2183-84 (2008) (“We have sought to make the Commission's attribution rules bright-line tests in order to provide reasonable certainty and predictability to our regulatees, to ease administrative processing, and to avoid unduly disrupting capital flow.”).

audiences) and expediting regulatory review (thereby conserving Commission resources and permitting the public to more quickly realize the public interest benefits of media transactions).¹⁰ We recognize, however, that waivers may be appropriate in certain circumstances. To the extent that the Commission can establish standards that provide useful guidance regarding the types of waivers that may be appropriate to grant under the rubric of case-by-case analysis that is, by definition, the hallmark of a waiver request, then even the waiver process could provide some certainty and predictability.¹¹

The FCC also inquires whether it should develop an alternative structure such as determining a limit for all media within a relevant market.¹² While certainly an interesting concept and worthy goal, NAB submits that the FCC's experience with such limits suggest it would be impracticable to try to develop regulations that would govern ownership of all media within a market.¹³

¹⁰ *In the Matter of 2002 Biennial Review; Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13645, ¶ 82 (2003) (discussing benefits of bright-line ownership rules including certainty of outcome, conservation of administrative resources, reduction of administrative delays, and lowering of transaction costs).

¹¹ *See In the Matter of 2006 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*, 23 FCC Rcd 2010, 2041, ¶ 54 (2007) (even where ownership rules require a case-by-case analysis, providing built-in presumptions and a public interest test would promote predictability).

¹² *Notice* at 2 ("The existing rules limit concentration within a single industry and bilateral cross-ownership between two industries. Should the Commission continue to enforce limits of these types, or should it develop an alternative structure, such as determining an ownership limit for all media within a relevant market?").

¹³ *See, e.g.,* NAB Comments in MB Docket Nos. 02-277 *et al.* (filed Jan. 2, 2003) (a single rule approach "raises complex questions of comparing media outlets of varying type and scope" and "appears overly complex, impracticable, and susceptible to a successful judicial challenge").

B. The Commission's Public Interest Goals

The *Notice* asks questions about the three public interest goals that have traditionally guided the Commission's review of broadcast ownership rules (competition, diversity, and localism), including the relationship between the goals, and whether other public interest goals should be considered in the context of this proceeding. NAB believes that the Commission's examination of its broadcast ownership rules should be guided by the core principle that the public interest is best served by permitting broadcasters to compete effectively in the multi-platform, multichannel digital media marketplace.

As the Commission analyzes whether its three stated goals will promote the public interest, it should recognize that there is a potential for tension between these goals. For example, healthy competition for audiences and advertising dollars in the media industry is good. However, imposing undue limitations on common ownership of broadcast outlets, while theoretically increasing the *number* of competitors, can also result in several adverse impacts, including: (i) impeding broadcasters' ability to compete with *other* media outlets and remain economically viable in a multi-platform market; (ii) harming broadcasters' ability to invest in and develop programming that contributes to the diversity of available programming; and (iii) disserving local communities by making it more difficult or impossible for broadcasters to afford costly programming such as local news and public affairs and other programming that local viewers deem important. To avoid these pitfalls, the Commission will need to define the relevant product markets appropriately to reflect the wide array of outlets available to consumers in today's multimedia marketplace. Indeed, by establishing an appropriate

competitive paradigm that allows efficient combinations of broadcast outlets, the Commission can ensure that its localism and diversity goals will be met, because competitively viable local broadcast stations will have significant economic incentives to offer programming that meets the needs and interests of local communities.

1. The Public Interest is Best Served by Rules that Promote Competition on a Level Playing Field

The public interest and the Commission's goals will be best served by ownership rules that allow broadcasters to compete effectively against their myriad multichannel and other competitors. Local radio and television broadcasters take great pride in the programming and other value that they provide to listeners and viewers who receive free broadcast service in virtually every community in the nation. Local broadcasters continue to serve their listeners and viewers with a wide variety of entertainment, news, public affairs programming and vital emergency information. Broadcasters have a demonstrated record of unparalleled service to their local audiences.¹⁴

NAB recognizes that the formats and styles of broadcast stations vary greatly. They are not all alike, nor should they be. The fact is that broadcasters provide service that meets the unique needs and interests of local communities even as the competitive business model under which they operate is under assault from multiple and growing sources in today's multi-platform, multichannel world.

For broadcasters to continue to serve their local communities with the unique programming their local audiences seek, the Commission's rules must permit

¹⁴ See, e.g., Comments of the National Association of Broadcasters in MB Docket No. 04-233 (filed Nov. 1, 2004); Reply Comments of the National Association of Broadcasters in MB Docket No. 04-233 (filed Jul. 11, 2008).

reasonable combinations of station ownership so that broadcasters can compete effectively with other, less regulated outlets and platforms. As the Commission has itself recognized, only competitively viable broadcast stations supported by adequate advertising revenues can serve the public interest effectively and provide a significant local presence.¹⁵ Providing up-to-the minute news, local and national emergency information and highly-valued entertainment programming takes significant resources. Stations must be supported and sustained by economics that make sense in today's world. Broadcasters cannot compete successfully, and serve their communities successfully, unless they have a somewhat level playing field with the new and varied competitors, including multichannel video and audio providers that are not subject to restrictions on ownership at the local or national levels.¹⁶

¹⁵ See *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992) (“*FCC Radio Order*”) (“The [radio] industry's ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”).

¹⁶ In this regard, NAB notes that a court recently vacated the cable horizontal ownership cap. See *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). In 2001, the Commission's vertical cable ownership limits were vacated. *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (“*Time Warner II*”). These cable horizontal and vertical limits were mandated by Congress in 1992. 47 U.S.C. § 533(f). However, because of court reversals, vacatur, and remands, the limits have been invalid for a longer period of time than they have actually been in effect. As a result, while the cable industry operates without ownership limits, broadcasting continues to operate under rules adopted sometime between 1975 (i.e., newspaper broadcast cross-ownership) and 1999 (i.e., local television ownership). See also *Fox TV Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (vacating the cable/broadcast cross-ownership rule). Similarly, the Commission recently approved the merger of the only two satellite radio operators into a single entity, which can now offer hundreds of channels of audio programming in every local market in the country. This continuing asymmetric regulation of marketplace competitors does not serve the public interest.

2. Assessing Competition in the Media Marketplace as Part of the Ownership Rule Review is Statutorily Mandated

The analytical framework for evaluating the ownership rules is found in the Communications Act and Section 202(h) of the Telecommunications Act of 1996 and the court cases that have interpreted it. Section 202(h) requires the Commission to “determine whether any of [its ownership rules] are necessary in the public interest **as the result of competition**” and to “repeal or modify any regulation it determines to be no longer in the public interest.”¹⁷ Competition should, therefore, be the centerpiece of the Commission’s analysis. Localism and diversity will logically flow from ensuring a competitive media marketplace because financially viable outlets will have significant economic incentives to offering programming that meets the needs of local communities.

It is important to recall the state of the broadcast industry in the early 1990s before some of the ownership restrictions were reformed to permit more economically viable ownership structures. In 1992, for example, the Commission found that, due to “market fragmentation,” many in the radio industry were “experiencing serious economic stress.”¹⁸ Specifically, stations were experiencing “sharp decrease[s]” in operating profits and margins.¹⁹ By the early 1990s, “more than half of all stations” were losing money (especially smaller stations), and “almost 300 radio stations” had gone silent.²⁰ Indeed, the Commission concluded that “radio’s ability to serve the public interest” had

¹⁷ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-112 (emphasis added).

¹⁸ *FCC Radio Order*, 7 FCC Rcd at 2756.

¹⁹ *Id.* at 2759.

²⁰ *Id.* at 2760.

become “substantially threatened.”²¹ Accordingly, the Commission believed that it was “time to allow the radio industry to adapt” to the modern information marketplace, “free of artificial constraints that prevent valuable efficiencies from being realized.”²²

Similar concerns drove Congress to require the Commission to regularly evaluate its broadcast ownership rules. The legislative history of the periodic review mandate indicates that it was intended to “preserve and to promote the competitiveness of over-the-air broadcast stations.”²³ Congress found that “significant changes” in the “audio and video marketplace” called for a “substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes.”²⁴ Congress specifically noted the “explosion of video distribution technologies and subscription-based programming sources,” and stated its intent to ensure “the industry’s ability to compete effectively” and to “remain a vital element in the video market.”²⁵

Congress directed the Commission to eliminate a number of its ownership rules, including the national numerical caps on radio and television station ownership and the cable-broadcast network cross-ownership restriction. It also directed the Commission to relax other local rules. Section 202(h), which mandates that the Commission periodically review its broadcast ownership rules to determine whether they remain necessary in the public interest as the result of competition, was an important part of the paradigm. The current media marketplace is marked by dramatic growth in competition

²¹ *Id.*

²² *Id.*

²³ H.R. Rep. No. 204, 104th Cong., 2d Sess. at 48 (1995) (“*House Report*”).

²⁴ *House Report* at 54-55.

²⁵ *Id.* at 55.

for viewers and listeners. There are greater numbers and different types of outlets and providers. Consumer tastes are changing, especially among younger viewers and listeners. Fundamental changes in the advertising marketplace have affected free, over-the-air broadcast stations more than subscription-based media. In this environment, local broadcast stations are clearly unable to obtain and exercise any undue market power. For this reason, the traditional competition rationale for maintaining a regulatory regime applicable only to local broadcasters and not their competitors must be reexamined. If anything, the primary competition-related concern in today's digital, multichannel marketplace is the continued ability of local broadcasters to compete effectively and to offer the free, over-the-air entertainment and informational programming upon which Americans rely.

The *Notice* asks several important questions about the Commission's competition analysis. Among other things, the Commission asks what approach it should take to determine the relevant product and geographic markets, and what metric it should use to measure competition. NAB believes that the Commission has inappropriately limited the scope of the product market in the past. The Commission should carefully study the wide range of media offerings that compete for the time and attention of potential viewers and listeners, and should recognize that free over-the-air radio and television stations compete with many other sources of news, information and entertainment.²⁶ The Commission should consider the ability to attract both audiences

²⁶ Even as long ago as the 1980s, the Commission recognized that the emergence of "new technologies coupled with the continued growth in the number of television [and radio] stations, will create" an economic environment with more competition for the time and attention of television viewers. *See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log*

and advertising revenue, since advertising revenue is particularly important to outlets like free, over-the-air broadcast stations that are primarily supported by such revenue. Moreover, once the appropriate product market(s) for broadcast outlets have been identified, the Commission should ensure that its new rules reflect the competition from these other outlets.

The Commission also asks how its analysis should take into account recent changes in the media industry, such as the increased number of channels carried by cable and satellite operators, the transition to digital TV broadcasting, the decline of newspapers, and the increased use of the Internet for news and entertainment. NAB thinks these are important questions, and all of these factors should be evaluated in determining the competitiveness for the local markets in which broadcast stations compete. The challenges currently faced by newspapers, which also are extremely reliant on advertiser support, may be a “canary in the coal mine” for free, over-the-air broadcasting if greater flexibility to form more efficient ownership structures and try new business models is not permitted. NAB urges the Commission to carefully examine developments such as the decline of newspapers and the continuing growth of multichannel video and audio providers as part of its analysis of the media marketplace. As NAB has previously demonstrated, cable operators and other multichannel video programming distributors offer hundreds of channels of video programming in local

Requirements for Commercial Television Stations, 98 FCC 2d 1076, 1086, 1099 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *rev'd in part*, *ACT v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

television markets, and compete with local broadcast television stations for viewers and local (as well as national) advertising revenues.²⁷

In light of current competitive realities, NAB believes that the Commission must, at a minimum, revise the newspaper cross-ownership ban that it and a reviewing court have recognized as out-of-date.²⁸ The Commission also must recognize the impact multichannel providers have had on the competitive position of local television stations, as articulated by the D.C. Circuit Court of Appeals.²⁹ NAB opposes any suggestion that the FCC's broadcast ownership rules should remain unchanged or made even more restrictive. To support such views, one must believe that the media marketplace has not changed over the past several decades or that it is *less* competitive and diverse than before the development of digital technology, numerous multichannel video and audio services, and the Internet. Such a position is clearly untenable.

3. Localism and Diversity Will Flow Logically From a Competitive Market

In order to be successful in the current media ecosystem, local media must provide a differentiated product. There are too many general entertainment and information sources now available to all consumers for local media to just provide more

²⁷ See NAB Comments in MB Docket No. 06-121 at (filed Oct. 23, 2006) at Attachment F, "Local Television Market Revenue Statistics" (documenting the growing advertising revenue shares of local cable systems as compared to the advertising shares of local television broadcast stations); *Id.* at Attachment C, "A Second Look at Out-Of-Market Listening and Viewing" (discussing the audience share of stations outside local television and radio markets).

²⁸ *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372, 398-400 (3rd Cir. 2004).

²⁹ *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 329 (D.C. Cir. 2002) ("Having found for purposes of cross-ownership that counting other media voices 'more accurately reflects the actual level of diversity and competition in the market,' the Commission never explains why such diversity and competition should not also be reflected in its definition of 'voices' for the local ownership rule.").

of the same. Market forces will drive local media outlets to offer a product that appeals to local audiences and possibly targeted to a niche audience within the local market that is not already being served by other outlets. But, as discussed above, in order for broadcasters to contribute to localism and diversity in local markets, they must be competitively viable. If free, over-the-air broadcasting continues to be subject to restrictions not imposed on its subscription-based competitors, stations will be unable to compete or to afford costly, high-quality programming and services that will best serve local audiences. Local broadcast stations also will be hindered in their ability to experiment with new formats and content that could contribute to diversity in local markets.

The Commission has for many years sought to measure the amount of competition and/or diversity in local markets by ensuring that there were a particular number of separate owners of media outlets, or “voices,” in each market. These “voice” tests fail to include many independent sources of news, entertainment, and information in local markets.³⁰ As a result, they establish thresholds so high that combinations are impossible in many markets where sufficient competition and diversity among various types of outlets and platforms would remain even if more common ownership was permitted. Such tests are harmful to diversity and localism because a station that is in serious financial distress or dark does not have a significant local presence or, indeed,

³⁰ Indeed, at their extreme, these “voice” tests count only one type of voice out of the myriad outlets available in local markets. See 47 C.F.R. § 73.3555(b)(2002) (only television “voices” count toward the applicable eight-voice threshold); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002)(remanding local television ownership rule on grounds that the FCC failed to explain why media other than television did not contribute to competition and diversity, and were not treated as “voices,” for purposes of the local television ownership rule).

even a “voice” at all. Reform of the Commission’s ownership rules to permit local broadcasters to develop economically efficient structures will allow them to continue the programming and other services that already contribute to localism and diversity in their markets, and/or expand innovative offerings.³¹

C. Potential Data-Gathering and Studies

The *Notice* seeks information on the specific study questions/topics the FCC should pursue, what types of data the FCC should collect to support its analysis, whether there are particularly useful existing, public or proprietary datasets that the FCC should obtain, and whether certain ongoing studies or project would be particularly useful.³² NAB supports the Commission’s efforts to identify the hard data and studies that will undergird its analyses during the upcoming review. As NAB noted during the recent ownership workshop, the Commission should base its decisions about ownership rules on real evidence and should obtain current, realistic data that fully accounts for the impact that new media sources have on broadcast stations and the audiences they serve. Below, NAB makes some recommendations for potential data-gathering and studies that would help to inform the Commission’s analysis of its ownership rules.

NAB has previously documented in detail the audience fragmentation and increasing competition for listeners, viewers and advertising revenue experienced by broadcast stations, as the result of new entry by cable television, satellite television and radio, numerous Internet video and audio applications, and mobile devices such as

³¹ Significant capital expenditures are required for innovative upgrades that will allow the public to realize the full benefits of the digital transition. Stations that are not financially viable cannot afford to convert to high-definition production and distribution of local news, for example.

³² *Notice* at 3.

iPods. We noted, for example, that in the first three months of 2007, Internet advertising set new records by taking in \$4.9 billion, a 26% increase over the previous year.³³ Similarly, cable's share of local television advertising has also grown substantially, with cable local advertising revenues increasing 12.2% from 2003 to 2004 and 12.0% from 2004 to 2005.³⁴ These trends have only continued since the Commission's last quadrennial review.³⁵ Market fragmentation is further underscored by the fact that analysts which previously measured only broadcast and cable

³³ *Internet ads hit another milestone*, Chicago Tribune, Jun. 7, 2007.

³⁴ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, Table 4 (2006). This report also documented the continued growth in viewing shares of cable/satellite television, at the expense of broadcast television.

³⁵ See, e.g., Stephanie Clifford, *A Look Ahead at the Money in the Communications Industry*, THE NEW YORK TIMES, Aug. 4, 2009, available at: http://www.nytimes.com/2009/08/04/business/media/04adco.html?_r=1&partner=rss&mc=rss (reporting on projected changes in the advertising market, including that by 2013, the market share of advertising via video games will be the size of today's newspaper advertising market share); Joe Mandese, *Online Ad Spending Rises At Double-Digit Rates, Gains Share vs. All Other Media*, MEDIAPOSTNEWS, Jul. 6, 2009, available at: http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=109200 (reporting projections that Internet ad spending would rise to \$56.8 billion, or 12.6% of the global advertising economy in 2009); *BIA Lowers TV Station Revenue Forecast*, TVBR.COM, Jul. 1, 2009, available at: <http://www.rbr.com/tv-cable/15543.html> (reporting on projections that television station advertising revenues (national and local spot combined) would be \$16.6 billion in 2009, down from previous estimate of \$17 billion); *Economic Tailspin Batters Local TV*, PHILADELPHIA INQUIRER, May 21, 2009, available at: http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=106527; Brian Stelter, *Ad Losses Put Squeeze on TV News*, THE NEW YORK TIMES, May 11, 2009, available at: <http://www.nytimes.com/2009/05/11/business/media/11local.html>; Joe Mandese, *Revised Forecast Predicts Internet Will Be Only Medium to Grow Ad Dollars This Year*, MEDIAPOSTNEWS, Apr. 14, 2009, available at: http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=104044; *Study: Web Ad Dollars Surpass Radio*, FMQB, Mar. 31, 2009, available at: <http://www.fmqb.com/article.asp?id=1248405> (web advertising grew to \$23.4 billion in 2008, a 10.6% increase over 2007, while radio advertising revenue was estimated at \$19.5 billion in 2008).

advertising have expanded their research and monitoring services to include a much broader range of media outlets.³⁶ The record in the new ownership rule review must include updates of this data so that revised ownership rules reflect the fact that traditional broadcasters and newer programming distributors compete fiercely for advertising revenue and audiences in local markets.

The Commission should ensure that its studies evaluate competition within small and mid-sized markets, particularly in light of its past determinations that stations in smaller markets can face disproportionately greater economic challenges as compared to their large market counterparts.³⁷ Another study that could inform the Commission's decision on ownership rules would be an examination of investment trends. Investment is the lifeblood of any industry, so the FCC should endeavor to determine how its ownership policies affect investment in the media marketplace. In particular, the FCC should examine the difficulties that broadcast outlets have today in obtaining investment capital, and whether those difficulties are, in part, related to regulatory burdens such as ownership restrictions. Anecdotal evidence suggests that investment capital flows more

³⁶ For example, BIA's *Media Ad View* product tracks "ad spending and revenue changes for 12 media categories" including Radio, Newspaper, Television, Local Cable, Direct Mail Magazines, Print Yellow Pages, Interactive (e.g., ads associated with such items as local search engines, online Yellow Pages, Email, and Mobile), and "Out-of-Home" (e.g., Digital billboards, taxis, gas pumps, elevators, furniture, transit)). See *BIA/Kelsey, Media Ad View: Market-By-Market Local Spending Reports*, available at: <http://www.bia.com/mediaadview/>.

³⁷ *In the Matter of 2002 Biennial Review; Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13697-99, ¶¶ 201-03 (2003) (NAB study demonstrates that small market stations are competing for disproportionately less revenue than stations in large markets; disparities justify permitting more combinations in smaller markets).

freely to the lesser regulated media space. This, in turn, could limit opportunities for diversity of ownership.

III. CONCLUSION

NAB urges the Commission to focus on the public interest benefits that will flow from the competitive viability of broadcast stations as it undertakes its next review of broadcast ownership rules. To realize these public interest benefits, the Commission must modernize out-of-date restrictions that do not reflect current competitive realities. Reasonable reform to outmoded limitations is required by statute and will enable free, over-the-air broadcasters to compete more effectively against their many competitors for audiences and advertising revenue in the media marketplace. As the FCC has previously recognized, only competitively viable broadcast stations supported by adequate advertising revenues can serve the public interest effectively, provide a significant presence in local communities, and offer costly local services such as local news. Above all, broadcasters want to be able to continue to serve their local communities and audiences effectively. Reform of local ownership limitations can help local stations do just that.

Respectfully submitted,

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November 20, 2009

APPENDIX A

Testimony of Jane E. Mago
Executive Vice President & General Counsel
National Association of Broadcasters

Before the
Federal Communications Commission
Media Ownership Workshop
November 4, 2009

SUMMARY

- The basic principle that the FCC should keep in mind as it examines the broadcast ownership rules is that the public interest is best served by permitting broadcasters to compete effectively in the digital multichannel marketplace.
- The analytical framework for the Commission's analysis of these rules may be found in the Communications Act, particularly Section 202(h) and the cases interpreting it. Under that framework, the FCC must take current competitive conditions into account as it reviews the broadcast ownership rules.
- The Commission should base its decisions on real evidence, not unsupported opinion. To that end, it is important to have current, realistic data that fully accounts for the impact that new media sources have on broadcast stations and the audiences they serve.

Good morning and thank you for allowing me to participate in this workshop on media ownership. My role today is to represent the views of free, local radio and television broadcast stations throughout the country on this important topic. In my opening remarks, I intend to make three main points. First, the basic principle that the FCC should keep in mind as it examines the broadcast ownership rules is that the public interest as it relates to these rules is best served by permitting broadcasters to compete effectively in the digital multichannel marketplace. Second, the analytical framework for the Commission's analysis of these rules may be found in the Communications Act, particularly Section 202(h) and the cases interpreting it. Under that framework, the FCC must take current competitive conditions into account as it reviews the broadcast ownership rules. Third, the Commission would be well served if it bases any judgment of these rules on real evidence, not unsupported opinion. To that end, it is important to have current, realistic data that fully accounts for the impact that new media sources have on broadcast stations and the audiences they serve.

Allow me to expand briefly on each of these points. My first point is that the public interest is best served by rules that will allow broadcasters to compete effectively in the digital multi-media world. Local radio and television broadcasters take great pride in the programming and other value that they provide to listeners and viewers who receive free broadcast service in virtually every community in the nation.

Despite what some have suggested, local broadcasters continue to serve their listeners and viewers with a wide variety of entertainment, news, public affairs programming and vital emergency information. Broadcasters have a demonstrated record of unparalleled service to their local audiences. True, the formats and styles of broadcast stations are varied. They are not

all alike, nor should they be. The fact is that broadcasters provide service to their local communities even as the competitive business model under which they operate is under assault from multiple and growing sources in today's multi-platform, multichannel world.

I don't think it will surprise anyone to hear me say that to maintain their ability to provide quality local service, broadcasters believe that the FCC's rules must permit reasonable combinations of station ownership so that broadcasters can compete effectively. As the Commission has itself recognized, only competitively viable broadcast stations supported by adequate advertising revenues can serve the public interest effectively and provide a significant local presence. Providing up-to-the minute news, local and national emergency information and highly-valued entertainment programming takes money. Stations must be supported and sustained by economics that make sense in today's world. Broadcasters cannot compete successfully, and serve our communities successfully, unless they have a somewhat level playing field with the new and varied competitors that are not subject to restrictions on local ownership.

To be clear, broadcasters are not calling for an end to all ownership regulation. But in light of current competitive realities, the Commission must revise the newspaper cross-ownership ban that it and the reviewing court have recognized as out-of-date. The Commission must also recognize the impact multichannel providers have had on the competitive position of local television stations, as articulated by the D.C. Circuit Court of Appeals.

Let me also clearly oppose any suggestion that restrictions on broadcast ownership should remain unchanged or even increased. To support such views, one must believe that the media marketplace has not changed over the past several decades or that the media marketplace is less competitive and diverse than before the development of digital technology, numerous multichannel video and audio services, and the Internet. Such a position is clearly untenable.

It is important to recall the state of the broadcast industry in the early 1990s before some of the ownership restrictions were reformed to permit more economically viable ownership structures. In 1992, for example, the Commission found that, due to “market fragmentation,” many in the radio industry were “experiencing serious economic stress.”¹ Specifically, stations were experiencing “sharp decrease[s]” in operating profits and margins. *FCC Radio Order*, 7 FCC Rcd at 2759. By the early 1990s, “more than half of all stations” were losing money (especially smaller stations), and “almost 300 radio stations” had gone silent. *Id.* at 2760. Indeed, the Commission concluded that “radio’s ability to serve the public interest” had become “substantially threatened.” *Id.* Accordingly, the Commission believed that it was “time to allow the radio industry to adapt” to the modern information marketplace, “free of artificial constraints that prevent valuable efficiencies from being realized.” *Id.*

This leads me to my second point: that the analytical framework for evaluating the ownership rules is found in the Communications Act and Section 202(h) of the 1996 Telecommunications Act and the court cases that have interpreted it. The motivation behind the Congressional directive that the FCC regularly evaluate the ownership rules was to “preserve and to promote the competitiveness of over-the-air broadcast stations.”² Congress found that “significant changes” in the “audio and video marketplace” called for a “substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes.” *House Report* at 54-55. Congress specifically noted the “explosion of video distribution technologies and subscription-based programming sources,” and stated its intent to

¹ *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2756 (1992) (*FCC Radio Order*).

² H.R. Rep. No. 204, 104th Cong., 2d Sess. at 48 (1995) (*House Report*).

ensure “the industry’s ability to compete effectively” and to “remain a vital element in the video market.” *Id.* at 55.

Congress specifically directed elimination of a number of the Commission’s ownership rules, including the national numerical caps on radio and television station ownership and the cable-broadcast network cross-ownership restriction. It also directed the Commission to relax other local rules. Section 202(h) was an important part of the paradigm. In particular, Section 202(h) requires the Commission to “determine whether any of [its ownership rules] are necessary in the public interest **as the result of competition**” and to “repeal or modify any regulation it determines to be no longer in the public interest.”

I am not going to go through an exhaustive tale of the litigation that has sustained much of the communications bar in the wake of the 1996 Act and various attempts to change the ownership rules. Rather, I will note that a key lesson to be learned from those cases is that the Commission must take current competitive conditions into account as it reviews the broadcast ownership rules.

The current media marketplace is marked by a growth in competition for viewers and listeners. There are greater numbers and different types of outlets and providers. Consumer tastes are changing, especially among younger viewers and listeners. Dramatic changes in the advertising marketplace have affected free, over-the-air broadcast stations more than subscription-based media. In this environment, local broadcast stations are clearly unable to obtain and exercise any undue market power. For this reason, the traditional competition rationale for maintaining a regulatory regime applicable only to local broadcasters and not their competitors must be reexamined.

If anything, the primary competition-related concern in today's digital, multichannel marketplace is the continued ability of local broadcasters to compete effectively and to offer the free, over-the-air entertainment and informational programming upon which Americans rely.

This is where my third principle comes into play: The Commission should base its decisions on real evidence, not unsupported opinion. To that end, it is important to have current, realistic data that fully accounts for the impact that new media sources have on broadcast stations and the audiences they serve.

NAB has previously documented in detail the audience fragmentation and increasing competition for listeners, viewers and advertising revenue experienced by broadcast stations, as the result of new entry by cable television, satellite television and radio, numerous Internet video and audio applications, and mobile devices such as iPods. We noted, for example, that in the first three months of 2007, Internet advertising set new records by taking in \$4.9 billion, a 26% increase over the previous year.³ Similarly, cable's share of local television advertising has also grown substantially, with cable local advertising revenues increasing 12.2% from 2003 to 2004 and 12.0% from 2004 to 2005.⁴ The record of this proceeding must include updates of this data, and the local ownership rules should be structured so that traditional broadcasters and newer programming distributors – which clearly compete fiercely for advertising revenue and audiences – can all compete on an equitable playing field.

Another study that could inform the Commission's decision on ownership rules would be an examination of investment trends. Investment is the lifeblood of any industry, so the FCC

³ *Internet ads hit another milestone*, Chicago Tribune, June 7, 2007.

⁴ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, Table 4 (2006). This report also documented the continued growth in viewing shares of cable/satellite television, at the expense of broadcast television.

should endeavor to determine how its ownership policies affect investment in the media marketplace. In particular, the FCC should examine the difficulties that broadcast outlets have today in obtaining investment capital, and whether those difficulties are related to asymmetric regulation of broadcast outlets in comparison to their competitors. In this regard, NAB notes that cable operators are not subject to local ownership restrictions (e.g., the D.C. Circuit vacated the local cable/broadcast cross-ownership rule) and that the same court more recently vacated the 30% national horizontal cap on cable operators. Anecdotal evidence suggests that investment capital flows more freely to the lesser regulated media space.

Conclusion

Broadcasters are not calling for an end to all ownership regulation, but for the modernization of out-of-date restrictions that do not reflect current competitive realities in the Internet age. Reasonable reform to outmoded limitations will enable free, over-the-air broadcasters to compete more effectively against multichannel video and audio operators and Internet-based media providers. As the FCC has previously recognized, only competitively viable broadcast stations supported by adequate advertising revenues can serve the public interest effectively, provide a significant presence in local communities, and offer costly local services such as local news. Above all, broadcasters want to be able to continue to serve their local communities and audiences effectively. Reform of local ownership limitations can help local stations do just that.