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

In the Matter of	)	
	)	
2022 Quadrennial Regulatory Review	)	MB Docket No. 22-459

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

In late December of 2022, the Media Bureau released a Public Notice[1] triggering the 2022 quadrennial review of the broadcast ownership rules, despite the FCC's failure to conclude the *2018* quadrennial review, as required by Section 202(h) of the 1996 Telecommunications Act (1996 Act). The National Association of Broadcasters (NAB)[2] subsequently requested the FCC to briefly toll the 2022 quadrennial ownership proceeding, including comment deadlines set by the Notice, until the Commission fulfilled its statutory obligation by expeditiously concluding the 2018 review, and urged completion of that review by March 31, 2023.[3] As of this filing, the Commission has not even responded to NAB's Request, and consequently continues to defy Congress's mandate.

As NAB also explained in its Request (at 6-9), an incomplete but still pending 2018 review seriously hampers stakeholders' efforts to submit specific and useful comments to inform a distinct 2022 review. Put simply, this effort appears to be a waste of time and

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[1] *Media Bureau Opens Docket and Seeks Comment for 2022 Quadrennial Review of Media Ownership Rules*, Public Notice, MB Docket No. 22-459, DA 22-1364 (Dec. 22, 2022) (Public Notice or Notice).

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

[3] NAB, Request to Toll the 2022 Quadrennial Regulatory Review and to Expeditiously Conclude the 2018 Quadrennial Regulatory Review, MB Docket Nos. 22-459, 18-349 (Feb. 1, 2023) (NAB Request).

resources. The futility of the process is compounded by the Bureau's brief Public Notice posing generic questions and raising the same issues that NAB and other stakeholders addressed at length in the long-pending 2018 review (and that the Commission should have answered by completing that quadrennial). Accordingly, NAB submits for the record here comments, reply comments, studies, and *ex parte* submissions it prepared for the 2018 quadrennial and for the FCC's 2022 biennial examination of the communications marketplace, in which NAB most recently discussed the fierce competition in the audio, video, and advertising markets.[4]

Below, NAB describes how the extensive materials previously submitted to the Commission address the general issues raised once more in the Public Notice, including barriers to minority and female ownership of broadcast stations, the emergence of new audio and video options, changes in consumer behavior, and technological innovation. For instance, it has been clear since at least the Carter Administration that one of the greatest barriers to ownership diversity in broadcasting is a lack of access to capital. Perhaps the only difference between now and the 1970s is that the Commission itself has become an additional roadblock to diversity, as the Media Bureau just recently rejected a transaction that would have brought scores of television stations under minority control.[5] The Public Notice (at 3) also recognizes "fundamental" changes in consumer behavior, such as the use

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[4] *See* Attachment I, Comments of NAB, MB Docket No. 18-349 (Apr. 29, 2019) (NAB 2019 Comments); Attachment II, Reply Comments of NAB, MB Docket No. 18-349 (May 29, 2019) (NAB 2019 Reply Comments); Attachment III, Comments of NAB, MB Docket No. 18-349 (Sept. 2, 2021) (NAB 2021 Comments); Attachment IV, Reply Comments of NAB, MB Docket No. 18-349 (Oct. 1, 2021) (NAB 2021 Reply Comments); Attachment V, Written *Ex Parte* Communication of NAB, MB Docket No. 18-349 (Feb. 16, 2022) (NAB 2022 Ownership *Ex Parte*); Attachment VI, Comments of NAB, GN Docket No. 22-203 (July 1, 2022) (NAB Commc'n Market Comments); Attachment VII, Reply Comments of NAB, GN Docket No. 22-203 (Aug. 1, 2022) (NAB Commc'n Market Reply Comments).

[5] Hearing Designation Order, MB Docket No. 22-162, DA 23-149 (Med. Bur. Feb. 24, 2023).

of streaming alternatives, but puzzlingly still asks whether the FCC "should" adjust its analysis of the audio and video marketplace to account for those changes. The answer, as the FCC ought to know, is not that it *should* adjust its view of the media market but that it *must*, given the requirements of Section 202(h) and the Administrative Procedure Act (APA).

NAB further shows that changes in the marketplace over the short time since it filed exhaustive comments, data, and studies in 2019, 2021, and 2022 are simply more of the same – that is, more competition for audiences and advertising from audio and video content providers of all types and from digital advertising platforms. These long-standing marketplace trends have made the existing analog-era ownership rules not just unnecessary but harmful to local stations' competitive viability, and the record does not support their retention in their current form, if at all.[6] The FCC cannot retain, consistent with law, local radio and TV ownership rules that pre-date internet ubiquity, the proliferation of digital devices, and widespread adoption of audio and video streaming services, as well as the growth of social media and "Big Tech." Notably, the dominant ad platforms and tech companies, including Alphabet, Amazon, and Apple, now also compete directly with radio

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[6] Since 2018, NAB has urged the FCC, if it retains local radio caps, to (1) eliminate caps on AM ownership in all markets; (2) permit a single entity to own up to eight FM stations in Nielsen Audio markets 1-75 (with the opportunity to own up to ten FMs by successfully participating in the FCC's incubator program); and (3) remove restrictions on FM ownership in Nielsen markets 76 and lower and in unrated areas. This proposal reflects the challenging competitive position of the local radio industry overall and accounts for the economic struggles of smaller market and AM stations in particular. *See* NAB 2019 Comments at 29-39 and Attachment A thereto, BIA Advisory Services, *Local Radio Stations in the New Media Marketplace* (Apr. 19, 2019); NAB 2021 Comments at 68-84. NAB also has long argued that the FCC should no longer retain the *per se* restrictions that ban combinations among top-four rated TV stations, regardless of their audience or advertising shares, and that prevent ownership of more than two stations in all markets, regardless of market size and stations' competitive positions. It is a myth that top-four stations across all markets occupy positions of competitive power and that TV markets such as Glendive, Montana are equivalent to the New York City or Los Angeles markets, as the local TV rule pretends. *See* NAB 2019 Comments at 70-79 and Attachment B thereto, BIA Advisory Services, *The Economic Irrationality of the Top-4 Restriction* (Mar. 15, 2019); NAB 2021 Comments at 84-99.

and TV broadcasters for audiences, as these giant entities own leading audio and video streaming services and enjoy yet another competitive advantage by controlling many of the consumer technologies (e.g., smartphones, smart speakers, connected TV devices, etc.) used by hundreds of millions of Americans to access digital content.

Finally, NAB observes that the Public Notice may be more notable for what it ignores than for what it repeats. References to the advertising marketplace, the state of competition in that market, or the competition that local radio and TV stations face for vital advertising and investment dollars are conspicuous by their complete absence, despite Section 202(h)'s directive for the FCC to evaluate every four years the public interest necessity of its broadcast ownership restrictions "as the result of competition." That silence also appears to reflect FCC indifference to the ability of broadcasters to earn a healthy level of advertising revenues and attract necessary investment and, thus, to provide their most important public service by far – offering over-the-air (OTA) entertainment and informational audio and video programming in local markets across the country at *no cost to the public*.

II. NAB AND OTHER COMMENTERS HAVE ALREADY ADDRESSED MANY ISSUES RAISED IN THE PUBLIC NOTICE

Despite its brevity, the Public Notice raises issues and poses questions that the FCC asked and that NAB and other parties addressed in previous quadrennial reviews and other proceedings. The Commission therefore already should know the answers to a number of the Notice's questions from comments, data, and studies NAB and other stakeholders submitted in 2019 and 2021 for the record in the 2018 quadrennial and as part of the FCC's 2022 review of competition in the communications marketplace. NAB discusses several of these issues below and points out the extensive materials earlier filed with the FCC that addresses questions raised again in the Public Notice (at 3-4).

Diverse ownership of broadcast stations. Repeatedly asking about the effects of ownership restrictions on minority and female ownership yields the same answer: that the FCC's decades-old rules have never successfully promoted diverse ownership of radio and TV stations but instead hinder new investment in broadcasting.[7] And that is because structural ownership rules do not address the main barrier to new entry and diverse ownership in broadcasting – a lack of access to capital – and they exacerbate the FCC's self-inflicted wound of over-regulation. By impeding capital investment in the broadcast industry, the ownership rules and other asymmetric regulations disadvantage existing broadcasters in a competitive market and discourage new entry, especially by potential diverse owners who traditionally struggle to access capital.

In seeking comment "on barriers to minority and female ownership of broadcast stations," the Public Notice (at 4) asks a question to which the FCC and interested stakeholders have known the answer since at least the disco era. In 1978, the FCC's Minority Ownership Task Force stated that the "principal barrier to minority ownership is the availability of funding" and concluded that "minorities must gain access to capital markets, or else they will continue to remain underrepresented among the ranks of station owners."[8] Throughout subsequent decades, the FCC consistently reaffirmed this conclusion.[9]

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[7] *See, e.g.,* NAB 2022 Ownership *Ex Parte* at 51-56; NAB 2021 Comments at 9-19; NAB 2021 Reply Comments at 15-27; NAB Commc'n Market Reply Comments at 25-32.

[8] FCC, *Minority Ownership in Broadcasting*, Minority Ownership Taskforce Report, at 11-12 (May 17, 1978).

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

Unsurprisingly, then, 80 years of maintaining structural ownership rules have not materially fostered minority and female station ownership and, in fact, the levels of diverse ownership were notably *lower* in the past when the ownership rules were much stricter than today.[10] Indeed, the FCC previously recognized that its ownership rules were "not designed to foster minority ownership in the broadcasting industry" and have "not yielded such an effect."[11]

The only additional barrier to increased ownership diversity that has arisen recently is the FCC's transaction review process. On the precipice of one of the largest infusions of capital into the broadcasting business by a minority owner in history, last week the Media Bureau rejected the proposed Standard General-TEGNA transaction. In its hearing designation order, the Bureau did not state that the transaction would violate any rules. It only expressed concerns about the impact the deal might have on cable companies' content acquisition costs and a potential post-transaction reduction in force (despite explicit commitments the parties made to the contrary). By artificially depressing the number of minority-controlled broadcast stations, the Media Bureau has made it abundantly clear that when faced with a golden opportunity to increase diversity in broadcasting versus kowtowing to those hostile to the broadcast industry, diversity suddenly becomes not all that important.

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other federal agencies, as well as minority and female broadcasters, also have acknowledged that women- and minority-owned businesses face special obstacles in accessing capital. *See, e.g.,* NAB 2021 Comments at 11-14.

[10] *See, e.g.*, NAB 2021 Reply Comments at 20-21; NAB 2019 Reply Comments at 17-18.

[11] 1984 Ownership Order, 100 FCC 2d at 48. During the last completed quadrennial review, the FCC stated that, "considering the low levels of minority and female ownership," it did not believe that "the [newspaper] cross-ownership ban has protected or promoted minority or female ownership of broadcast stations in the past 35 years, or that it could be expected to do so in the future." *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4455, 4470 (2014) (2014 Quadrennial FNPRM/R&O) (agreeing with commenters, including NAB, that low levels of minority/female ownership "cannot be attributed solely or primarily to consolidation").

And when combined with the FCC's non-existent efforts to make its radio incubator program a success, the FCC's time for crying wolf when it comes to diversity has run out.

Beyond the FCC's recent telling actions, those parties still fixated on retaining analog-era ownership restrictions either do not understand, or do not care, that their "solution" will not solve or even directly address ownership diversity because structural ownership rules do not inject capital into the industry. Indeed, the opposite is true, as asymmetric regulations on broadcasting, including ownership rules, discourage investment in and the provision of capital to broadcasters and make non-broadcast investment opportunities comparatively more inviting.[12]

As the Public Notice apparently recognizes,[13] parties claiming that structural ownership rules foster minority and female ownership of broadcast stations have long failed to provide convincing empirical evidence to support their claims.[14] They even have failed to explain *how* structural rules would better enable new entrants, including minorities and

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[12] Studies have shown that retaining legacy asymmetric regulations in an era of increased competition creates regulatory distortions, drives up the regulated industry's costs, causes scarce investment capital to flow to less regulated industries, deters new firm entry, and places the more heavily regulated companies at a competitive disadvantage. *See* NAB 2021 Comments at 15-16 (identifying studies).

[13] *See* Public Notice at 3-4 (stating that commenters in prior proceedings have encouraged the FCC to evaluate the ownership rules' effects on minority/female station ownership, and asking commenters "to explain in detail or to demonstrate with legal analysis and empirical evidence" how any "concrete changes" they propose to the ownership rules would address concerns about minority/female station ownership).

[14] *See, e.g.*, NAB 2021 Reply Comments at 20-27; NAB 2022 Ownership *Ex Parte* at 51-53; NAB Commc'n Market Reply Comments at 25-28; *see also FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1159-60 (2021) (upholding FCC's reform of several of its ownership rules and observing that no commenter in the 2010/2014 quadrennial reviews had submitted empirical evidence indicating that changing the ownership rules would likely harm minority/female ownership in the future, and that the "purely backward-looking" studies submitted to the FCC by Free Press actually showed a "long-term increase in minority ownership" after the local radio and TV ownership rules were relaxed in the 1990s).

women, to obtain investment capital needed to acquire and operate broadcast stations.[15] It strains reason and logic to insist that they do.[16] After all, if asymmetric regulations, including ones forcing broadcasters into uneconomic ownership arrangements, artificially depress (or merely flatten) the value of stations, then investors would lack incentives to provide capital to the broadcast industry, and would instead invest in entities in other industries with increasing values, making it more difficult for existing and prospective broadcasters to obtain capital. Women and minorities who usually struggle to access capital would be even more challenged to obtain adequate financing in this environment. The Commission previously agreed with this position.[17]

[15] *See*, *e.g.*, *Schurz Communs. v. FCC*, 982 F.2d 1043, 1055 (7th Cir. 1992) (rejecting argument that the financial interest and syndication rules promoted diversity because FCC had failed "to explain *how* [the rules] do this") (emphasis added).

[16] As explained in earlier quadrennial reviews, ownership restrictions actually (1) reduce the asset and net worth values of station owners (including minorities and women), harming their ability to borrow against their assets to finance growth; (2) artificially depress the value of stations, thereby disproportionately increasing the ability of white male investors, who generally have greater access to capital than women and minorities, to acquire stations; and (3) reduce the long-term attractiveness of broadcasting relative to other investment opportunities. *See* Reply Comments of the Center for Regulatory Effectiveness, MB Docket No. 06-121, *et al*., at 2-3 (Oct. 25, 2007); NAB 2022 Ownership *Ex Parte* at 53-56; NAB Commc'n Market Reply Comments at 29-32.

[17] In the past when commenters opposing ownership rule reform suggested that relaxing the rules would lead to higher station prices, thereby disadvantaging minority new entrants, the FCC stated that its rules were not intended to "artificially deflat[e] the prices of stations." 1984 Ownership Order, 100 FCC 2d at 48. It also repeated that the "major barrier to increased minority ownership is the unavailability of adequate financing." *Id*. Thus, the FCC's focus should be "promot[ing] the availability of financing to minorities on equal terms," and if financing was not made available, then minorities would remain largely unable to purchase stations, even at lower prices. *Id*. at 49. It was therefore "inappropriate" to retain or adopt ownership rules "to deflate market prices artificially," *id*., and it would be even more inappropriate today, given broadcasters' increased struggles to obtain needed investment. *See* NAB 2022 Ownership *Ex Parte* at 54-56; NAB Commc'n Market Reply Comments at 31-32.

As NAB has explained,[18] it would be arbitrary and capricious and contrary to Section 202(h) for the FCC to retain competitively unsound structural ownership rules for the purported purpose of promoting new entry and diverse ownership because (1) it lacks sound empirical evidence showing that such rules have in the past or likely will in the future effectively promote ownership diversity or that changes to those rules would likely harm future levels of minority/female ownership; (2) it has explicitly found that the primary barrier to increased ownership diversity is the lack of access to capital, which structural rules do not remedy; and (3) asymmetric regulations discourage investment and entry by reducing the attractiveness of broadcasting to lenders, equity investors, and potential new entrants and help starve existing and prospective broadcasters of vital capital.[19] "To the extent that governmental action to boost ownership diversity is appropriate and in accordance with the law," any such action should not be in the "form of indirect measures that have no demonstrable effect on minority ownership and yet constrain all broadcast licensees," such as structural ownership rules.[20] It is deeply ironic, if not disingenuous, for the Commission to bemoan the lack of new entry and diversity in broadcasting while refusing to implement its radio incubator program – the only current FCC program addressing new entrants' lack of

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[18] *See*, *e.g.*, NAB 2021 Comments at 18-19.

[19] Beyond difficulties under both the APA and Section 202(h), the FCC also would create constitutional problems if it were to retain structural ownership rules for the sole or primary purpose of promoting minority and female ownership, even if the rules themselves are facially race- and gender-neutral. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) (stating that laws race neutral on their face but "unexplainable on grounds other than race" are "of course presumptively invalid"). Neither the FCC nor any parties to previous quadrennial reviews, moreover, have been able to show a connection between minority/female ownership and viewpoint diversity, or even to devise studies likely to provide such evidence, particularly evidence of the sort capable of meeting current constitutional standards (let alone potentially stricter standards in the future). *See, e.g.,* NAB 2021 Reply Comments at 23-27; NAB Commc'n Market Reply Comments at 27-28. *See also* Public Notice at 4 (asking commenters to demonstrate how changes to the ownership rules to promote diverse ownership "could withstand legal scrutiny").

[20] 2014 Quadrennial FNPRM/R&O, 29 FCC Rcd at 4456-57.

access to capital – and while denying a transaction that would have greatly increased minority ownership of TV stations.

New audio and video options in the marketplace. NAB has lost count of the number of times it has addressed the explosion of audio and video content available via myriad platforms, including online, and the proliferation of digital devices capable of accessing that content. In fact, NAB takes issue with the Public Notice's reference (at 3) to "the *emergence* of *new* video or audio options." Many of the non-broadcast programming options that directly compete with broadcast stations for audiences and advertising are not "new," and the devices making that competing content available at any time and in any place are not emerging in the market, but ubiquitous. NAB and other stakeholders over the decades of multiple quadrennial reviews have exhaustively documented these marketplace changes and their direct effects on the competitiveness of local radio and TV stations offering audio and video content free to consumers.[21] Indeed, the Commission itself has documented the "ascendance" of online video distributors, not merely their emergence.[22]

In the summer of 2022, NAB yet again documented the continuing transformation of the media marketplace caused by the seemingly infinite amount and variety of audio and video content options and the ever increasing numbers of devices and platforms available in the market for accessing that content. And we reiterated how that competition – combined with broadcasters' lack of scale and unequal competitive playing field – exacerbates local

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[21] *See* NAB 2021 Comments at 64-99 and Attachments E, F, G, H, I, & J thereto; NAB 2021 Reply Comments at 63-70 and Attachment A thereto; NAB 2019 Comments at 7-28, 43-54, and Attachments A, B, C, D, E, & F thereto. Beyond the long-pending 2018 review, NAB documented the increased competition terrestrial broadcasters face from non-broadcast content providers in quadrennial reviews dating back to 1998. *See* Comments of NAB, MM Docket No. 98-35 (July 21, 1998) (attaching study on the availability of media outlets on a DMA basis, including, *inter alia*, those accessed via cable, DBS, and the internet).

[22] *2022 Communications Marketplace Report*, GN Docket No. 22-203, FCC 22-103, at ¶ 280 (Dec. 30, 2022) (2022 Competition Report).

stations' challenges and their ability to offer effective service to local markets, especially smaller ones.[23] Finally, NAB again showed, as it had done in earlier quadrennial reviews, that audio and video markets include not only broadcast stations but also multichannel programming distributors and online content providers[24] -- a fact that the FCC has already acknowledged.[25]

In short, the FCC has been well informed about the explosion in competing, non-broadcast audio and video options for years and should have already acted to reform (or eliminate) its local ownership rules to fully account for the vastly increased competition and diversity provided by these options. As it is now commonplace to say that the abundance of choice is "overwhelming" for audiences,[26] the retention of ownership restrictions dating from the last century in which scarcity was perceived to be a defining characteristic of media markets is both irrational and contrary to Section 202(h).

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[23] *See* NAB Commc'n Market Comments at 10-58 and Attachments B, D, E & F thereto.

[24] *Id*. at 5-10 and Attachment A thereto, J. Eisenach and L. Wu, *et al*., *The Evolution of Competition in Local Broadcast Television Advertising and the Implications for Antitrust and Competition Policy*, at 2 (Oct. 2020) (NERA Study) (finding that digital advertising delivered over broadband networks constitutes a direct substitute for local broadcast TV advertising, adding to existing competition from cable TV (which competes directly with broadcast for local advertising dollars) and other media); *see also* NAB 2022 Ownership *Ex Parte* at 18-29; NAB 2021 Comments at 55-63; NAB 2019 Comments at 7-28, 43-57.

[25] *2020 Communications Marketplace Report*, 36 FCC Rcd 2945, 3047 (2020) (concluding that the video marketplace continues to be dominated by MVPDs, OVDs, and broadcast TV stations, the three types of participants that have "defined the market for the past decade"); *id*. at 3086 (stating that three types of audio providers, terrestrial radio, satellite radio, and online audio providers, dominate the audio marketplace); 2022 Competition Report at ¶ 212 (stating that MVPDs, OVDs, and broadcast TV stations remain the three primary types of participants in the video marketplace and that, in the past two years, competition among these participants had evolved); *id*. at ¶ 295 (identifying the major participants in the marketplace for the delivery of audio programming as terrestrial radio broadcasters, satellite radio providers, and online audio providers).

[26] Nielsen, *Streaming is the future of TV, but the abundance of platform choice is overwhelming for viewers* (Apr. 11, 2022).

Changes in consumer behavior. The Public Notice (at 3) also asks whether the FCC "should" adjust its analysis of the audio and video programming marketplace to account for "fundamental changes in consumer behavior," such as "use of streaming alternatives." Given "fundamental" market changes, it would violate the APA and Section 202(h) for the FCC's rules to fail to reflect those changes.[27] That question, moreover, has been answered by NAB and other stakeholders in previous quadrennial reviews, and the information and empirical evidence earlier provided should have already led the FCC to revise, if not repeal, its local ownership restrictions.

Most recently, in 2021 and 2022, NAB showed that the COVID-19 pandemic had only accelerated the already rapidly growing audience and advertiser use of digital outlets, devices, and platforms for accessing today's nearly limitless audio and video content options and for reaching consumers with marketing messages.[28] Indeed, the Commission, even prior to the pandemic, had acknowledged changes in consumer behavior and their greatly increased usage of video and audio entertainment and news accessed via MVPDs, the internet, and digital devices.[29] And media and advertising analysts have agreed, as stated by Deloitte, that "the COVID-19 story isn't so much 'before and after' as it is 'before

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[27] *See*, *e.g.*, *ACLU v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987), citing *Am. Trucking Ass'ns v. Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967) (noting agencies' duty to "monitor the effects" of their regulations and make adjustments to reflect "new developments or better understanding of the relevant facts"); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (stating that the "very purpose of § 202(h)" is to function as an ongoing mechanism to ensure that the FCC's regulatory framework would "keep pace with the competitive changes in the marketplace").

[28] *See, e.g.,* NAB 2021 Comments at 64-96; NAB Commc'n Market Comments at 10-50.

[29] *See 2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 33 FCC Rcd 12111, 12112-13 (2018) (2018 Ownership NPRM); *2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9834 (2017) (2017 Ownership Reconsideration Order).

and *faster*.'"[30] In short, the FCC is legally bound to revise (or remove) its local ownership rules to take account of the "fundamental changes in consumer" and advertiser behavior.

Technological innovation**.** Beyond the innovations that lead to the proliferation of non-broadcast audio and video content and digital devices, the broadcast TV industry is transitioning to ATSC 3.0, which integrates seamlessly with internet protocol, improves spectrum efficiency, and allows broadcasters to enhance their services to the public. Unfortunately, this FCC appears to greet innovation in broadcasting much less enthusiastically than innovation in wireless and other industries.[31]

As NAB has discussed on several occasions,[32] broadcasters face regulatory speedbumps to investment and innovation that other communications market participants, including the giant tech platforms and even other FCC licensees, do not confront. Wireless carriers, for example, move from one generation of technology to the next on their own terms and on their own schedule, but TV broadcasters must seek FCC approval – with its inevitable delays – to invest millions of their own dollars in their own facilities to improve a service offered free to the public. The Commission actively seeks to make additional spectrum available to wireless carriers and for unlicensed services to encourage innovation

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[30] Deloitte, *Digital media trends survey*, at 3 (14th ed. 2020). *See also*, *e.g.*, Borrell Associates, *2022 Benchmarking: Local Media's Digital Revenues*, at 5 (Apr. 20, 2022) (finding that the pandemic "re-energized digital marketing in a dramatic way"); PwC, *Global Entertainment & Media Outlook 2021-2025, Power shifts: Altering the dynamics of the E&M Industry*, at ii (2021) (stating that COIVD-19 "accelerated changes in consumer behavior to pull forward digital disruption" by several years); Nielsen, *The Gauge Shows Streaming Is Taking A Seat At The Table* (June 17, 2021) (stating that the "past year has categorically shifted the television viewing landscape"); D. Baine, *U.S. ad market does better in pandemic than in Great Recession*, Kagan, a media research firm within S&P Global Market Intelligence (Mar. 1, 2021) (comparing the effects of the pandemic to "someone toss[ing] a grenade into the ad market" at least for most sectors, with the notable exception of digital).

[31] The Public Notice (at 3) is unclear as to the types of technological innovations to which it refers, as it only includes the bare words "technological innovation."

[32] *See, e.g.,* NAB Commc'n Market Comments at 59-62; NAB 2021 Comments at 106-107.

and deployment of new services,[33] while broadcasters have faced years-long regulatory processes when seeking permission to offer new services, such as ATSC 3.0 and digital audio broadcasting (DAB), using the spectrum already licensed to them.

NAB also observes that technological innovations in broadcasting – including those allowing local stations to expand and improve their OTA services offered free to the public – inevitably result in calls to increase stations' regulatory burdens. The Commission does not consider imposing further regulatory requirements on other industries as they embrace technological advances, and has not, for example, revisited its mobile spectrum holdings policies merely because wireless carriers have shifted from 3G to 4G and now to 5G. Similarly, while faster mobile broadband speeds tend to lead to higher monthly wireless bills,[34] the FCC does not use increased consumer costs as a reason to restrict wireless operators' deployments of 5G. In contrast, after approving broadcasters' use of ATSC 3.0 as serving the public interest, the Commission repeatedly sought comment on the (illusory) implications of broadcasters' voluntary decision to deploy ATSC 3.0 for evaluating changes to the local and national TV ownership restrictions.[35]

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[33] *See, e.g.*, *Expanding Flexible Use in the 3.7-4.2 GHz Band*, Report and Order, 35 FCC Rcd 2343 (2020); *Unlicensed Use of the 6 GHz Band*, Report and Order and Further Notice of Proposed Rulemaking, 35 FCC Rcd 3852 (2020).

[34] *See, e.g.*, A. Ilumba, *How Much Are Americans Spending on Their Phone Plans?*, whistleout.com (July 13, 2022) (citing Bureau of Labor Statistics data on steadily increasing phone rates since 2013); S. Mortiz, *Wireless Price Hikes Fatten Profits for Phone Carriers with Few Risks*, Bloomberg.com (July 19, 2022) (describing recent increased fees and charges on consumers' wireless phone bills and citing an estimate that "fee and service increases will boost revenue for the large carriers by $3 billion").

[35] See *Media Bur. Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, Public Notice, 36 FCC Rcd 9363, 9366 (MB 2021); 2018 Ownership NPRM, 33 FCC Rcd at 12138; *National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd 10785, 10796 (2017). This reflexive urge to couple broadcast innovation with additional regulatory obligations is not new, as the FCC considered a remarkably wide range of potential new public interest requirements for TV broadcasters simply due to the congressionally-mandated switch to digital technology – which ultimately cost broadcasters

NAB continues to believe that TV and radio broadcasters' efforts to enhance their ability to serve viewers and listeners through technological innovation (especially when doing so within the same spectrum footprint) offer no justification for retaining outdated, asymmetric ownership restrictions, let alone for increasing regulatory burdens on the broadcast industry. There is no rational basis for viewing improvements in technology as an excuse for regulation; indeed, doing so would be a perverse disincentive for broadcaster adoption of new technologies and would not serve the public interest.

Instead, the Commission should acknowledge that broadcasters often need to make significant capital investments when adopting new technologies and should prioritize promoting broadcast innovations with the potential to both improve the public's TV and radio services and the competitive viability of OTA broadcasting. Allowing greater economies of scale through more rational ownership rules would help station groups afford investments in improved technology. Beyond that, the FCC needs to act now to push the ATSC 3.0 transition forward so that TV broadcasters can keep pace with other marketplace competitors.[36]

III. THE MOST RECENT MARKETPLACE DEVELOPMENTS CONTINUE LONG-ESTABLISHED TRENDS WELL KNOWN TO THE FCC

The short answer to the Public Notice's generic request for comment (at 3) on the media marketplace, including ongoing trends or developments, is simply "more of the same." In the brief time since NAB submitted extensive comments, data, and studies in 2019, 2021, and 2022, there is more competition for audiences and advertising from audio

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millions of dollars per station and resulted in the return of previously allocated TV spectrum to the FCC. *See* NAB Commc'n Market Comments at 60-61.

[36] Specifically, the FCC must plan to end the wasteful dual transmission in both ATSC 1.0 and ATSC 3.0; establish a task force to focus on the ATSC 3.0 transition and move it along more expeditiously; and otherwise demonstrate its commitment to ATSC 3.0 as the future of broadcasting to encourage the consumer electronics industry to build more devices for consumers to use to access ATSC 3.0 signals. *See* NAB Notice of *Ex Parte* Communication, MB Docket No. 16-142 (Jan. 25, 2023).

and video content providers of all types and from digital ad platforms, including the behemoth tech and social media platforms. And these recent trends make it even more urgent for the FCC to reform or eliminate its local radio and TV ownership restrictions.

Even a concise summary of some recent market developments demonstrates rapid, continuous change, with more and more consumers embracing digital video and audio services and devices. For example:

- As of spring 2022, 87 percent of U.S. TV households had at least one internet-connected TV (CTV) device (e.g., Smart TV, stand-alone streaming device like Roku, Amazon Fire TV stick, Google's Chromecast, or Apple TV, and/or connected video game systems or Blu-ray players), up from 82 percent in 2021 and 30 percent in 2011, with a mean of 3.9 devices per TV household.[37] Daily viewership of video on CTV devices grew substantially just from 2021 to 2022, with younger persons using those devices most frequently.[38]

- A 2022 survey by Hub Entertainment Research found that 76 percent of U.S. TV homes had at least one smart TV, up from 70 percent in 2021, and smart TVs accounted for 57 percent of all TV sets in households, up from 45 percent in 2020.[39] In spring 2022, 59 percent of TV households had at least one stand-alone streaming device.[40] TV broadcasters have reported that these platforms (e.g., Roku, Amazon Fire TV, etc.) commonly require content providers such as broadcasters to share a percentage (e.g., 30 percent) of their ad inventory with the platform – and the platform then retains all the ad revenue for that share.[41] Growing use of these platforms will increase the downward pressure on TV broadcasters' ad revenue.

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[37] Leichtman Research Group (LRG), Press Release, *46% of Adults Watch Video via a Connected TV Device Daily* (June 3, 2022) (LRG CTV Data 2022); LRG, Press Release, *39% of Adults Watch Video via a Connected TV Device Daily* (June 4, 2021) (LRG CTV Data 2021).

[38] As of spring 2022, 46 percent of adults in U.S. TV households watched video via a CTV device daily, up from 39 percent in 2021 and three percent in 2011. Among those ages 18-34, 62 percent watched TV via a CTV device every day (up from 54 percent in 2021), as did 54 percent of those ages 35-54 (up from 43 percent in 2021). LRG CTV Data 2022; LRG CTV Data 2021.

[39] G. Winslow, *Smart TV Ownership Rises to 76% of TV Households*, tvtechnology.com (Apr. 7, 2022).

[40] LRG CTV Data 2022.

[41] NAB 2021 Comments at Attachment A thereto, NAB Written Statement for the Record, *Online Platforms and Market Power, Part 1: The Free and Diverse Press*, U.S. House of Representatives, Comm. on the Judiciary, Subcomm. on Antitrust, Commercial and Admin. Law, at 15 (Sept. 2, 2020).

- As of summer 2022, 59 percent of adults watched video on non-TV devices (e.g., mobile phones, home computers, tablets, and eReaders) daily, up from 43 percent in 2017 and only 18 percent in 2012.[42] This trend will only become more pronounced, as 83 percent of those ages 18-34 watch video on such devices every day.[43]

- The FCC has recognized the significance of consumers' embrace of mobile devices and smart speakers for audio market competition.[44] Americans' time spent listening to audio through a mobile device has surpassed the time spent listening through a radio receiver.[45] Even when consuming audio at home, consumers ages 13+ use mobile phones more than any other device, including AM/FM receivers.[46] The wireless providers' rollout of 5G technology will likely further incentivize consumer acquisition and use of mobile devices for accessing audio and video content.

- Along with rapid adoption of digital devices, consumers have further increased their broadband subscribership. As of late 2022, 89 percent of U.S. households got a broadband internet service at home, up from 84 percent in 2017.[47] Edison Research just reported on March 2 that 95 percent of the U.S. population ages 12+ has internet access.[48]

Consumers have been incentivized to adopt this growing array of digital devices by the explosion in the number and variety of streaming services and other options that compete with broadcast stations for audiences and advertising revenues:

- As of summer 2022, 83 percent of U.S. households had an SVOD service from Netflix, Amazon Prime, and/or Hulu, up from 78 percent in 2020 and 64 percent in 2017, and close to two-thirds of households subscribed to more than one of these services.[49] According to a recent survey, 51 percent of adults said they choose

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[42] LRG, Press Release, *59% of Adults Watch Video on Non-TV Devices Daily* (Aug. 24, 2022).

[43] LRG, *59% of Adults Watch Video on Non-TV Devices Daily.*

[44] *See* 2022 Competition Report at ¶¶ 322-326.

[45] Edison Research, *2022 Top 10 Findings*, edisonresearch.com (Dec. 16, 2022).

[46] Edison Research, *Weekly insights*: *listening at home* (Jan. 4, 2023).

[47] LRG, Press Release, *90% of U.S. Households Get an Internet Service at Home* (Dec. 22, 2022).

[48] Edison Research, *The Infinite Dial 2023*, at 3 (Mar. 2, 2023) (Infinite Dial 2023).

[49] LRG, *59% of Adults Watch Video on Non-TV Devices Daily.* There are innumerable other SVOD services beyond the leading three, some of which have tens of millions of subscribers and offer a range of programming, while others offer specialized or niche programming. *See* 2022 Competition Report at ¶¶ 239-243, 256 (also reporting an increase of U.S. SVOD subscriptions from 221.9 million in Q4 2019 to 333.1 million in Q4 2021). U.S. consumer spending on SVOD grew 37 percent in 2020, nearly 20 percent in 2021, and over 17

streaming services to watch first in the evening, while 42 percent said live TV first. Compounding broadcasters' competition, 66 percent of TV households also subscribed to some form of pay TV service (cable, satellite, telco, or vMVPD), as of fall 2022.[50] Counting pay TV, SVOD, and AVOD, the average consumer in 2022 had 9.86 video services, up from 8.8 in 2021,[51] all of which compete with broadcast stations for audiences.

- According to the FCC, in 2021 "about 80% of U.S. households were consuming AVOD, excluding video served on social-media sites."[52] Ad-supported video on demand is anticipated to keep growing, as nearly three-fifths of consumers are willing to watch ads to save money on streaming.[53] AVOD services not only compete with broadcast TV for audiences, but also for advertising directly, and streaming giants such as Netflix have begun offering lower-cost, ad-supported tiers, which only increases competition in the ad market. One report estimated that by 2027, free ad-supported streaming services will generate close to 70 percent of TV advertising.[54]

- The FCC has documented consumers' increased willingness to pay for subscriptions to music streaming services.[55] According to RIAA's conservative estimates, the number of U.S. paid music subscriptions rose from 43.7 million in the first half of 2018 to 90.0 million in the first half of 2022, while eMarketer estimated a much larger number (121.9 million) of paid digital audio subscribers in 2021.[56] According

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percent in 2022. D. Frankel, *The Great Streaming Recession Just Isn't Happening*, Next TV (Feb. 7, 2023).

[50] LRG, Press Release, *66% of TV Households Have a Live Pay-TV Service* (Oct. 21, 2022).

[51] W. Friedman, *Americans Near 'Double Digits' Number Of Video Services*, MediaPost Weekend (Oct. 28, 2022).

[52] 2022 Competition Report at ¶ 254.

[53] G. Winslow, *Many Consumers (57%) Willing to Watch Ads to Save on Streaming,* TV Technology (Dec. 19, 2022).

[54] D. Frankel, *YouTube Testing FAST Channels*, Next TV (Jan. 17, 2023). NAB has already documented the rapid growth in digital audio and video advertising, as broadcast radio and TV stations' ad revenues have declined. *See*, *e.g.*, NAB Commc'n Market Comments at 24-27, 46-49; NAB 2021 Comments at 76-79, 95-97 and Attachments G & J thereto; NAB 2021 Reply Comments at 65-69 and Attachment A thereto. Recent reports only reconfirm these trends, as Borrell Associates' estimate of local ad spending in 2023 predicts that digital formats will see a 7.7 percent increase in local ad spend while non-digital formats' ad spend will drop 5.9 percent. P. Kurz, *Local TV Ad Spend to Drop 18% Next Year as OTT Advertising Jumps*, TV Technology (Nov. 18, 2022). Borrell projects that the two sectors with the largest increases in local ad spend will be OTT video (12.6 percent increase) and digital audio (10.4 percent), with local TV seeing the largest decline (-18 percent). Inside Radio, *Borrell Revises Local Ad Forecast Upward, Calling For 3.2% Gain In 2023* (Nov. 18, 2022).

[55] 2022 Competition Report at ¶ 314.

[56] S. Lebow, *The number of US paid digital audio subscribers is rising faster than previously expected*, Insider Intelligence/eMarketer (Aug. 30, 2021); J. P. Friedlander, *Mid-Year 2022*

to a recent estimate, 222.7 million people in the U.S. listened to digital audio at least monthly in 2022, with 225.8 million projected to listen monthly in 2023, and time spent with digital audio among existing listeners has rapidly increased.[57] Growing numbers of consumers spend an increasing amount of time listening to podcasts. eMarketer estimated that in 2022, 124.5 million Americans were monthly podcast listeners and 98.4 million were weekly listeners, and it projected that weekly listeners would grow to 103.6 million in 2023.[58]

- As FCC data show, broadcasters (and cable operators) compete with online video distributors for audiences, and as viewership of OVD services has grown, viewership of both broadcast and cable TV has fallen.[59] The continued growth of streaming viewing throughout 2022 is well documented.[60] For 2023, forecasters are predicting that U.S. adults will spend more time watching digital video than all traditional linear TV.[61] Digital audio similarly takes up an increasing share of overall and digital media time among U.S. adults. In 2022, about 55 percent of total audio time was spent on digital platforms, surpassing the time spent on traditional radio.[62]

- The sheer amount of video and audio content available via streaming and other platforms is beyond vast. The era of "peak TV" continues, as 2022 set yet another new record (599) for the number of English-language original scripted series across

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RIAA Revenue Statistics (Sept. 2022). The RIAA figures excluded limited-tier subscriptions, counted multi-user plans as one subscription, and used the average number of subscriptions over the half-year (rather than the higher number at the end of the period).

[57] M. Willens, *A look at the US digital audio market in 2022*, Insider Intelligence/eMarketer (Jan. 3, 2023).

[58] Podcast News Daily, *Weekly Podcast Listeners To Top 100 Million In 2023, Says eMarketer Forecast* (Dec. 12, 2022). Edison Research reported in late 2022 that 18 percent of Americans 13+ listened to a podcast each day, rising from five percent in 2015. RAIN News, *Daily reach of podcasts in U.S. now 18%, says Edison Research* (Nov. 14, 2022).

[59] *See* 2022 Competition Report at ¶ 284 and n.858 (citing Nielsen report that streaming accounted for more total TV viewing time than either cable or broadcast in July 2022).

[60] *See, e.g.*, G. Winslow, *Streaming Viewing up 27% in 2022: Nielsen*, TV Technology (Jan. 26, 2023); G. Winslow, *Nielsen: Streaming Audiences in Dec. 2022 Up 46% YoY*, TV Technology (Jan. 19, 2023); Nielsen Insights, *Streaming services remain most popular destination for TV viewing in December* (Jan. 2023).

[61] G. Winslow, *Digital Video Viewing Time to Surpass TV Viewing in 2023*, TV Technology (Feb. 15, 2023) (citing Insider Intelligence report). For this projection, digital video included OTT and connected streaming services, as well as social video. Traditional linear TV included any type of video content delivered via OTA broadcast, cable, satellite, and telecom.

[62] E. Cramer-Flood, *Digital audio takes up an increasing share of US digital media time,* Insider Intelligence/eMarketer (June 21, 2022). Edison Share of Ear findings confirm that AM/FM radio's share of total audio time has declined, as more time is spent on other audio options (e.g., music videos on YouTube, podcasts, Spotify, etc.). RAIN News, *Edison "Share of Ear" trends (2018 to 2022) examined* (Aug. 23, 2022) (detailing AM/FM's falling share of total audio time among persons 18+ from 2018 to 2022).

> all platforms, up from 559 in 2021 and only 210 in 2009.[63] As of August 2022, U.S. audiences had more than 969,000 unique program titles to watch on streaming and traditional linear platforms,[64] with many of these titles featuring hundreds of individual episodes. Online audio providers allow listeners access to a wide and diverse range of content, with services such as Spotify, Apple Music, YouTube Music, and Amazon Music having libraries of 100+ million tracks.[65] Podcasts offer a wide range of content and personalities, with consumers able to choose from over two millions podcast series and about 92 million episodes as of early 2022.[66] Amidst this abundance, no one can seriously contend that the media marketplace fails to provide a diverse range of programming.

The current local radio and TV rules date from the 1990s, prior to the development and widespread adoption of the technologies, devices, and audio and video services discussed above. That fact alone warrants significant reform, if not removal, of these rules. But beyond this undisputable evidence showing terrestrial broadcasting to be only one of innumerable choices in a highly and increasingly competitive and diverse media market, the Commission also must acknowledge that the rise of the giant technology platforms has imperiled broadcast stations' ability to reach online audiences with their locally-oriented programming, including news, and to derive ad revenue from that content. In addition to diverting advertisers away from local stations in all-sized markets, these platforms also control the technologies that power both content discovery (search) and digital advertising, permitting them to make unilateral decisions and to monetize their own content online, at the expense of local broadcast and print outlets.[67] "[T]he local news industry is being

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[63] R. Porter, *Peak TV Climbs Again in 2022, Nearly Reaches 600 Scripted Series,* The Hollywood Reporter (Jan. 12, 2023).

[64] Nielsen, *Let's talk about streaming and engaging the Latino audience* (Sept. 2022).

[65] T. Newman, *Top 10 streaming services with the most tracks in 2023,* Digital Music News (Feb. 7, 2023).

[66] Nielsen, *Podcasting Today*, at 5 (May 11, 2022).

[67] See NAB 2021 Comments at 23-28 and Attachment B thereto, BIA Advisory Services, *Economic Impact of Big Tech Platforms on the Viability of Local Broadcast News*, at 21 (May 2021) (examining Google Search and Facebook News Feed and estimating that just these two platforms alone cause close to $2 billion in annual loss of value to broadcasters); *see also* NAB Commc'n Market Comments at 51-58.

decimated in the digital age,"[68] and the Commission should act to ensure that its ownership and other restrictions applicable solely to broadcasters no longer impede stations' ability to provide important local services.

The dominant platforms and tech companies, including Google, Amazon, and Apple, also now compete directly with radio and TV broadcasters for audiences, as these giant entities own a number of leading streaming audio and video services and enjoy yet another competitive advantage by controlling many of the consumer technologies (e.g., smartphones, smart speakers, connected TV devices, etc.) used by hundreds of millions of U.S. consumers to access digital content.[69] To say that broadcasters face challenges in successfully competing in a market dominated by competitors of such vast scale and financial resources seriously understates the problem, yet the FCC has never accounted in its quadrennial reviews for these fundamental structural changes in the marketplace.

In early 2023, for example, the five leading online audio brands were Spotify, YouTube Music, Pandora, Apple Music, and Amazon Music.[70] Among these top audio brands, Pandora is owned by SiriusXM, the country's sole satellite radio operator, which provides hundreds of channels of satellite-delivered audio programming in every local market in the U.S. – a number of channels exponentially greater than any terrestrial radio broadcaster is permitted to air in any local market. SiriusXM has combined the ad sales organizations of Pandora, Stitcher, and SiriusXM into SXM Media, creating a unified sales

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[68] Senator Maria Cantwell, U.S. Senate Comm. on Commerce, Sci., and Transp., *Local Journalism: America's Most Trusted News Sources Threatened*, Report, at 1 (Oct. 2020).

[69] *See*, *e.g.*, NAB Commc'n Market Comments at 3-5, 30-36, 49-51.

[70] See *The Infinite Dial 2023* at 44-46.

team crossing streaming, satellite radio, and podcasting. As of the third quarter of 2022, SXM Media was the top-ranked podcast network by reach, with Spotify ranking second.[71]

Even more formidably, Alphabet and Amazon, the owners of YouTube,[72] YouTube Music, Amazon Prime Video, and Amazon Music, are two of the three platforms (along with Facebook) that dominate digital advertising. The financial resources of a company such as Amazon, with its vast revenues from digital advertising and e-commerce, can offer audio and video streaming services essentially as loss leaders, providing them at no additional cost of part of a consumer's Prime membership.[73]

Beyond owning and controlling audio and video services and platforms that compete with local radio and TV stations for audiences and ad revenues, these same giant companies – unlike broadcasters – also own and control the technologies consumers use to access audio and video content online. For example, as of early 2023, about 260 million Americans owned smartphones,[74] and Apple is the leading brand of smartphone in the country. Apple accordingly possesses the ability to push its own audio and video content (Apple Music and Apple TV+[75]) to the hundreds of millions of its phones and other devices in U.S. consumers' hands, including tablets and computers, to the disadvantage of broadcasters who control none of the devices that consumers use to listen and watch

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[71] Edison Research, *U.S. top podcast networks, by reach q3 2022* (Dec. 6, 2022).

[72] YouTube is the OTT platform with the highest market penetration among OTT video service users. eMarketer, *Top OTT video streaming services in 2022 by viewer count and growth* (Mar. 18, 2022) (reporting that YouTube attracted 230.6 million monthly viewers).

[73] In addition to the "free" Amazon Prime Music streaming service, consumers can upgrade to the subscription Amazon Music Unlimited service, which is cheaper for Prime members than the other leading subscription music services. T. Pendlebury, *Best Music Streaming Service for 2023,* cnet.com (Jan. 23, 2023).

[74] Infinite Dial 2023 at 11.

[75] Apple includes free short-term subscriptions to Apple TV+ with the purchase of a variety of Apple devices. 2022 Competition Report at ¶ 242.

content. About 103 million Americans also own smart speakers, with Amazon's Alexa being the leading brand.[76] Unsurprisingly, those who own Alexa smart speakers listen to Amazon Music at much higher rates than other consumers.[77] The Commission has recognized the competitive relevance for broadcasters of the relationships between online content providers and the most popular device manufacturers.[78]

Significantly for radio broadcasters, the tech giants have expanded their reach into automobiles through integrated mobile operating systems. Reports last summer indicated that 98 percent of new cars in the U.S. come with Apple CarPlay installed.[79] As of early 2023, among those ages 18+ who had ridden/driven in a car in the last month, 16 percent had Apple CarPlay and 14 percent had Android Auto in their primary vehicles.[80] Again, these developments will disadvantage competing sources of audio content.

Apple's ability "to insert itself in between customers and car companies" to ensure the place of its interface in automobiles[81] is one that much smaller broadcasters in a more fragmented radio industry cannot emulate. The size, scope, and financial position of Apple (and Google), along with the near ubiquity of their technology, enable them to negotiate one-on-one with global car companies. But how are thousands of separate owners of radio stations – even the largest of which has but a fraction of the negotiating power of the tech giants – supposed to ensure their place in the dashboard of the future? The Commission

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[76] Infinite Dial 2023 at 15-16.

[77] *Id*. at 47.

[78] *See* 2022 Competition Report at ¶¶ 324-27.

[79] K. Leswing, *Apple's new car software could be a trojan horse into the automotive industry*, cnbc.com (July 22, 2022).

[80] Infinite Dial 2023 at 53.

[81] K. Leswing, *Apple's massive success with CarPlay paves the way for automotive ambitions*, CNBC (May 29, 2021).

cannot assume that in the digital age auto makers will continue to include AM/FM radio in cars' "infotainment" systems or, even if included, will ensure that terrestrial radio remains easily accessible in a dashboard configured to feature Apple's/Google's integrated mobile operating systems, satellite radio, and/or Amazon's voice assistant technology. The tech giants have no incentive to design any systems to feature competing content sources, such as AM/FM radio that provides important local content, including emergency journalism. As one commissioner recently stated, the continued inclusion of AM radio in electric vehicles already needs "urgent attention."[82]

A 2022 report on platform competition in the video market illustrates how the structure of today's video marketplace also severely disadvantages broadcast TV stations and how TV broadcasters struggle to compete with the tech giants that earn revenue via multiple platforms. Alphabet (Google/YouTube), for example, has its own AVOD/FAST service (YouTube[83]) and can generate additional revenue through its various platforms, including a virtual MVPD (YouTube TV, the largest vMVPD in the U.S.[84]), smartphone (Pixel, along with

[82] FCC News Release, *Comm. Simington Underscores Need for AM Resiliency* (Feb. 27, 2023) (agreeing with former FEMA leaders about AM radio's importance for public safety).

[83] "YouTube dominates AVOD." 2022 Competition Report at ¶ 254. In January 2023, viewing of YouTube and YouTube TV accounted for 8.6 percent of total TV usage (counting streaming, MVPD, broadcast, and other, by persons ages 2+), which represented more than one-third of the usage of broadcast TV (24.9 percent of total TV usage). Nielsen Insights, *High-demand sports and streaming content fuel a rise in total TV usage in Jan.* (Feb. 2023).

[84] nScreenMedia, *Why YouTube TV is the most popular vMVPD in America* (July 12, 2022) (reporting that YouTube TV had reached five million registered users). And due to the way that the FCC currently defines the term MVPD, local TV stations cannot negotiate for retransmission consent revenues with vMVPDs. NAB again urges the FCC to issue a public notice to refresh the record on its pending proposal to modernize its interpretation of the term MVPD by including vMVPDs in that definition. *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014); NAB Notice of *Ex Parte* Communication, MB Docket No. 14-261, at 1 (Feb. 7, 2023).

other mobile phones using Google's Android operating system), smart TV (Google TV (OS)), and connected TV device (Chromecast), all with advertising and "upsell" opportunities.[85]

Given this remarkable expansion of the media and advertising marketplaces to include the giant online platforms, the FCC's long-standing broadcast regulatory policies, including its ownership rules, are not only antiquated but also threatening to broadcasters' competitive viability. In this quadrennial review, the Commission must recognize the true extent of the competition terrestrial broadcasters face from multichannel and online outlets, as well as the significant challenges presented by a marketplace structure in which Big Tech offers competing audio and video content and controls the platforms and devices through which audiences access that content and advertisers reach consumers. While NAB does not expect the Commission to solve the broadcast industry's substantial competitive challenges, it must at the very least cease disadvantaging broadcasters through an outdated regulatory regime applicable only to them. In this proceeding, NAB again implores the FCC to give radio and TV stations a better chance to succeed in today's marketplace and continue serving local communities, as Congress intends and the law requires.

[85] G. Bridge, *Connected TV Competition: Get Subscription Video Right*, VIP+ Variety Intelligence Platform Special Report at 2, 5-6 (1st ed. Feb. 2022). "Formats with an upsell are where a [video] subscription can be made via the platform, with the platform taking a cut." *Id*. at 5-6 (explaining that the "new world sees hardware and software competing to be the consumer conduit to subscribing in order to be the service that levies an SVOD toll"). Connected TV advertising – the fastest growing video advertising platform – is digital advertising that appears on connected TV devices, such as Alphabet's Chromecast, Amazon's Fire TV, Apple TV, or Roku. Companies like Roku and Amazon have developed interfaces making it easy for viewers to subscribe to video services via their platforms, taking a cut of the subscription, and also building out competitive free streaming services (e.g., Roku Channel, Amazon FreeVee) to monetize users via serving ads. *Id*. at 2. Roku unveiled its own smart TVs in early January 2023 to compete with rivals including Amazon, which were already in the market with their own branded smart TVs. D. Frankel, *Roku Unveils Its Own Smart TVs (CES 2023)*, NextTV (Jan. 4, 2023).

IV. CONSISTENT WITH SECTION 202(h) AND ITS DUTY TO PROMOTE THE PUBLIC INTEREST, THE FCC CANNOT DISREGARD COMPETITION IN THE ADVERTISING MARKET AND ITS DIRECT IMPACT ON LOCAL STATIONS AND THEIR SERVICES

The Public Notice lacks even a single reference to the advertising market, competition in that market, or the competition local radio and TV stations face for indispensable ad dollars that support the very programming services the FCC purports to value. While the Public Notice (at 3) asks about consumers' marketplace "returns" under the current ownership rules, it ignores the necessity for broadcasters to earn significant "returns" (i.e., revenues) to pay for the entertainment, national and local news, sports, weather, and emergency information provided free to consumers in markets of all sizes. Without adequate financial returns to broadcasters, consumers' "returns" – the valuable and varied audio and video content available to them for free over-the-air – will inevitably decline in quantity and quality. After all, programming free to consumers, including local news, does not mean free for stations to acquire, create, produce, and/or distribute.[86] Indeed, even public media such as NPR have been forced to cuts jobs due to the erosion of advertising dollars, particularly for NPR podcasts, and the decline of underwriting.[87] The FCC's retention of archaic, asymmetric regulations, including ownership restrictions, only

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[86] NAB has documented the high cost of maintaining local TV news operations and shown how many TV (and radio) stations struggle to pay for local news and other high quality programming, especially in mid-sized and small markets with limited advertising bases. NAB also has discussed the various studies showing that most local markets in the U.S. cannot sustain four independent local TV news operations and that ownership rules limiting broadcasters' ability to achieve greater scale economies significantly reduces local news output. And NAB has explained how the giant tech platforms' dominance of both content discovery and digital advertising has placed local stations and their news operations under increasing duress by impairing broadcasters' ability to reach online audiences with their news content and earn online ad revenues from that content. *See, e.g.*, NAB 2021 Reply Comments at 32-36; NAB 2021 Comments at 19-37 and Attachments A, B, C, & D thereto; NAB Commc'n Market Comments at 51-58 and Attachments B, C, F, & G thereto.

[87] D. Folkenflik, *With layoffs, NPR becomes latest media outlet to cut jobs*, NPR (Feb. 23, 2023).

exacerbates the difficulties broadcasters face in providing high-cost (to them), locally-oriented, and competitively attractive programming at no cost to the public.

The Commission cannot, moreover, consistent with law, ignore competition for advertising; the serious economic impact that vastly increased competition for ad dollars has had on local stations; and the adverse effects that restrictions on their local scale have on broadcasters trying to achieve economies of scale, increase their cash flow, and compete for advertising and audiences in today's marketplace.[88] As NAB previously discussed in detail, Section 202(h) directs the FCC to determine every four years whether its broadcast ownership rules remain "necessary in the public interest as the result of competition." Competition is the only public interest factor Congress specifically identified, and that singular status indicates its preeminence as the driver of the FCC's required analysis. It is the lens through which the public interest need for the ownership rules must be viewed.[89]

While the Public Notice (at 3) asserts that Section 202(h)'s directive is "explicitly tied to the public interest standard," the Commission cannot consider its other public interest goals (traditionally, localism and viewpoint diversity) equally with competition in its Section 202(h) analyses. That would ignore Congress's explicit singling out of competition as the key

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[88] NAB has repeatedly documented the digital transformation of the advertising market and the direct negative effects on radio and TV stations' ad revenues over time. *See, e.g.,* NAB 2021 Comments at 75-59, 95-97 and Attachments G & J thereto; NAB 2021 Reply Comments at 66-68 and Attachment A thereto. Even the FCC has shown that radio stations' ad revenues through 2021 have never again reached the levels of ad revenue earned around the 2005-2006 period. 2022 Competition Report at ¶ 289, ¶ 303 and Fig. II.F.3 (also reporting that TV stations' local ad revenue fell to $9.7 billion in 2021, while online local ad revenue grew to $65 billion).

[89] *See* NAB 2021 Comments at 38-55 (analyzing in detail the text, structure, purpose, and legislative history of Section 202 and showing that Section 202(h) requires the FCC to undertake a competition-centric review, with an eye toward deregulation). It also would be arbitrary and capricious for the FCC to ignore important marketplace developments, including ad market changes, when reexamining its ownership rules. *Id*. at 42.

factor in the mandated periodic ownership reviews.[90] The Commission may wish to stress Congress's use of the phrase "in the public interest" in Section 202(h), but that language is not free-standing. The clear directive to "determine" whether the ownership rules "are necessary in the public interest as the result of competition" is not the equivalent of directing the FCC to "determine" whether its rules are "necessary in the public interest." Construing Section 202(h) as requiring merely a standard "public interest" analysis, rather than a competition-focused one, would be contrary to the plain language of the statute and would make the statutory phrase "as the result of competition" superfluous, contrary to

[90] NAB again observes that it also would be arbitrary and capricious for the FCC to retain (or attempt to tighten) the local TV rule on the basis of diversity because the FCC expressly decided in 2008 that the TV rule is intended to promote competition, not diversity. *See* NAB 2019 Comments at 57-59; NAB 2021 Comments at 37-38, n.102. Following *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the FCC in the 2006 quadrennial concluded that the local TV rule was intended to promote competition for viewers and advertisers in local markets, and specifically found, in a marketplace less diverse than the current one, that the rule was not needed to promote diversity. *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2064-66 (2008) (concluding that the local TV rule was "no longer necessary to foster diversity because there are other outlets for diversity of viewpoints in local markets, and a single service ownership restriction is not necessary to foster diversity"). *See also 2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864, 9887 (2016) (repeating that the primary purpose of the local TV rule is to promote competition and not to foster viewpoint diversity); 2017 Ownership Reconsideration Order, 32 FCC Rcd at 9835 (observing that FCC had, in its 2006 review, "determined that the [local TV] rule was no longer necessary to promote viewpoint diversity and instead relied on competition" to justify its rule). Thus, it would be arbitrary and capricious and contrary to Section 202(h) for the FCC to abruptly reverse course now and claim that the local TV rule is intended after all to promote viewpoint diversity and to use that rationale to retain the rule in a more diverse and competitive marketplace. *See* NAB 2019 Comments at 57-59. Nor can the FCC now seize on some new public interest rationale not previously considered to try to justify the retention of competitively unnecessary ownership rules. See Public Notice at 3 (asking whether there were other policy goals besides competition, localism, and diversity that the FCC should consider in relation to the ownership rules). Given the competition-centric text of Section 202(h) and Congress's intent in adopting Section 202, the FCC should not cast around for new public interest rationales for keeping its rules despite competitive changes. Even assuming the FCC could rely on new public interest rationales, it still must focus mainly on competition – the only factor specifically identified by Congress – in analyzing whether the rules remain necessary. *See* NAB 2021 Comments at 51-52.

several basic canons of statutory construction.[91] As the D.C. Circuit Court of Appeals stated when previously concluding that the FCC had failed to conduct an adequate competition analysis under Section 202(h), "the Commission failed even to address meaningfully the question that Congress required it to answer."[92]

Beyond complying with Section 202(h)'s requirements, the Commission also must take seriously its obligations under the Communications Act of 1934, and other major legislation including the 1996 Act, to fulfill Congress's intent to maintain a system of broadcast stations able to operate as viable private enterprises in a competitive market *and* capable of serving the public interest and local communities effectively.[93] In the context of quadrennial review proceedings, that means recognizing the regulatory and market structures undermining broadcasters' competitive viability and reforming the ownership rules to permit local stations in all-sized markets to take advantage of vital economies of scale, including in local news production.

As NAB recently explained,[94] given competition levels in the modern media landscape, the OTA broadcast industry can no longer bear the burdens of asymmetric regulation, including sub-optimal ownership structures, scarce investment capital, and delayed technological innovation, while continuing to serve local communities as the FCC

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[91] *See* NAB 2021 Comments at 47-51 (explaining that interpreting the "public interest as the result of competition" to be equivalent to the "public interest" would violate at least four tenets of statutory construction); *accord* NAB 2021 Reply Comments at 11-13.

[92] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044, *opinion modified on reh'g on other grounds*, 293 F.3d. 537 (D.C. Cir. 2002) (finding that FCC had not justified its retention of a TV ownership rule unchanged).

[93] *See* NAB 2021 Comments at 6-9 (explaining that to fulfill Congress's vision, the FCC must ensure that its broadcast regulatory framework enables local stations to serve the public interest and their communities of license, which means that the broadcast industry must remain economically viable and capable of providing OTA services free to consumers).

[94] *See* NAB Commc'n Market Comments at 4-5; 34-36; 50-51.

expects and that broadcasters want. At some point, broadcasting's lack of competitive scale, regulatory burdens (including paying over $230 million in regulatory fees while the overdue 2018 quadrennial has been pending),[95] and infrastructure costs may well lead some broadcasters to question whether providing content via unregulated platforms, such as online streaming, would be more economically viable.[96]

The Commission must consider here the real-world consequences of imposing, in a highly competitive marketplace, a burdensome and antiquated regulatory regime on an advertising-supported industry with high operational costs that must nonetheless provide audio and video content in markets across the country – including smaller ones with very limited advertising bases – at no cost to the public. Without changes, there will come a time when the math simply does not add up.

V. CONCLUSION

For the reasons NAB set forth above and repeatedly documented in multiple FCC proceedings, NAB requests that the Commission expeditiously conclude both its 2018 and 2022 quadrennial ownership reviews. If in these reviews the FCC determines to retain its

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[95] From 2019-2022 (inclusive), radio and TV stations paid approximately $230,421,000 in regulatory fees, while their digital competitors – including entities vastly larger than broadcast stations or groups – paid nothing.

[96] Beyond regulatory fees, radio and TV broadcasters bear costs and burdens that do not apply to other audio and video market participants, especially online ones. For example, every terrestrial broadcaster must acquire an FCC license by paying market price for it either in an auction or via an FCC-approved assignment or transfer transaction from an existing licensee (which may costs millions); build, acquire and/or lease, and then maintain, extensive infrastructure such as transmitters, towers, antennas, and real property to house them; bear the substantial costs (e.g., electricity) of transmitting an OTA signal to its community of license; comply with FCC regulations ranging from keeping online public and political files and station logs to providing EAS alerts to preparing quarterly issues/programs lists to airing required programming (e.g., children's educational/informational TV programs); and fulfill its statutory obligations to serve its community of license to qualify for renewal of its license every eight years. And above all, FCC-licensed broadcasters must provide signals free to the public and thus are more limited than many of their competitors in their options for recouping costs.

local TV and radio rules at all, then it must significantly ease those restrictions, as NAB has urged and more than justified in the attached comments and studies.

Respectfully submitted,

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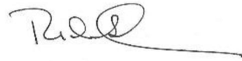

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