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

In the Matter of	)	
	)	
Status of Competition in the Marketplace	)	MB Docket No. 18-227
for Delivery of Audio Programming	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Based on the National Association of Broadcasters' (NAB)[1] and other parties' comments in this proceeding, the FCC's upcoming Communications Marketplace Report (Report) should reflect the proliferation of audio content providers and the vast options now available for consumers and advertisers in today's audio marketplace. As NAB also discusses herein, the Report should not opine on an unrelated legislative debate over copyright policy merely because the music industry is unhappy about certain copyright laws outside the FCC's purview. The Commission further must reject the erroneous argument that Congress's refusal to accede to the music industry's repeated demands for changes to the copyright laws somehow requires the FCC to retain it existing local radio ownership rules, irrespective of the competitive transformation of the audio market.

I. COMMENTING PARTIES AGREE THAT THE AUDIO MARKETPLACE INCLUDES MYRIAD PARTICIPANTS AND IS HIGHLY COMPETITIVE

Parties in this proceeding recognize the wide array of content providers in today's audio market beyond AM/FM radio stations, particularly stressing the growing marketplace

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

presence of the myriad online/streaming services.[2] Commenting parties also recognize the significant impact that the development and growth of these competing audio providers, and the resulting fragmentation of the audio market, has had on the competitive position of terrestrial radio.[3]

As NAB's comments in this and other FCC proceedings have explained, fragmentation and choice – for listeners, viewers and advertisers – are the key features of the 21st century media marketplace.[4] A recent Audio Monitor survey on U.S. music listening, for example, reports that AM/FM radio (over-the-air and online combined) receives 36 percent of total music listening time, while on-demand streaming and other internet radio (*e.g.*, Pandora)

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[2] See Comments of musicFIRST Coalition and Future of Music Coalition (Coalitions), MB Docket No. 18-227, at 13-20 (Sept. 24, 2018) (Coalition Comments) (discussing steady listenership growth of streaming via Spotify, Apple Music, Pandora and other services; the "quick ascent" of smart speaker usage; the "vast" consumption of on-demand music via YouTube; the continuing growth of satellite radio; and the reach of AM/FM radio); Comments of Joint Commenters, MB Docket No. 18-227, at 3-14 (Sept. 24, 2018) (Joint Comments) (discussing "dizzying array of consumer choices" and growing number of competitors for listeners and advertisers, including massive companies such as Apple, Amazon, Google, YouTube (owned by Google) and Facebook); Comments of NAB, MB Docket No. 18-227, at 10-20 (Sept. 24, 2018) (describing explosion of competition for audiences and advertisers in the audio marketplace, resulting from dramatic and continuing technological changes).

[3] *See* Joint Comments at 6-10, 13-15, 19-20 (explaining, *inter alia*, that the amount of time consumers previously spent listening to broadcast radio only is being redistributed to a still growing number of different services and that competition for ad revenue has increased in markets of all sizes); Coalition Comments at 18-20 (stating that AM/FM radio's role in music discovery is declining, as is consumers' time spent listening to terrestrial radio, and that SiriusXM is threatening AM/FM radio in the car, especially in connected cars); Comments of Local Community Broadcasters, MB Docket No. 18-227, at 4 (Sept. 24, 2018) (discussing competition local Florida stations face from online audio services and satellite radio); NAB Comments at 20-26 and Attachments A-E (discussing local stations' real and growing challenges in attracting audiences, particularly younger listeners, and earning advertising revenue, especially in smaller markets).

[4] *See, e.g.*, NAB Comments at 10-14 & n. 35 (describing the fragmentation of the listening audience); Comments of NAB, MB Docket No. 17-214, at 3-9 (Oct. 10, 2017); Comments of NAB, MB Docket No. 17-318, at 11-19, 27-29, Attachments A-E (Mar. 19, 2018).

receive 39 percent of listening time.[5] But on-demand streaming and internet radio account for 71 percent, 66 percent and 49 percent of the music listening time for those ages 16-19, 20-24 and 25-34, respectively. Only those listeners 45 and older spend more music listening time with AM/FM radio than with streaming/internet sources.[6]

And the advertising market has fragmented as well, with dollars that formerly were all spent with radio and other traditional media now being split with – or diverted to – multiple additional platforms. NAB's comments (at 16-20) described the tremendous growth in online and mobile advertising, and radio broadcasters gave specific examples of the expanding numbers of competitors for ad dollars, including in small markets. Midwest Communications reported the loss of local advertising accounts worth over $100,000 each in several markets (including Duluth, MN, Fargo, ND, Wausau-Stevens Point, WI and Hibbing, MN) to digital services such as Pandora and Google AdWords.[7] Through interviews with advertisers and ad agencies, Townsquare Media found that most advertisers across a range of markets now have, on average, three times the number of companies calling on them wanting to sell advertising time/space as they did a decade ago.[8] Given the emergence and rapid growth of competing advertising platforms over the past decade, it is unsurprising that the radio

[5] Ten percent of time is spent listening to digital downloads/files and additional time is spent listening to satellite radio and CDs/vinyl. Anna Washenko, *Audio Monitor U.S. Report: "A growing disconnect" as youth favors streaming while older groups continue tuning*, Radio & Internet News (Sept. 18, 2018).

[6] *See id.* Audiences, of course, spend substantial time with radio stations listening to news, weather, traffic, sports and other non-music programming.

[7] Joint Comments at 10-11.

[8] Joint Comments at 15. A decade ago, most sellers of ad time were traditional media companies; today, many are selling digital advertising products. *Id*.

industry has struggled to regain the total level of advertising revenue it achieved prior to the Great Recession.[9]

In short, the Commission's upcoming Report to Congress on the communications marketplace should focus on how differently audio content is delivered and consumed today compared to the analog past. This Report must make clear that local radio stations now operate in a vastly expanded and highly competitive audio market providing unprecedented choices for consumers and advertisers and that continuing technological change will create still more options for audiences in the future.[10]

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[9] Despite the explosive growth in the digital sector of the ad market, the U.S. advertising market as a whole has not yet equaled, let alone surpassed, its pre-Great Recession level. *See* Derek Baine, *Economics of Advertising: Digital to comprise 45% of $283B ad market by 2027, up from 32% in 2017*, Kagan (Jan. 24, 2018) (reporting that the domestic ad market reached $254.9 billion in 2006 and totaled $241.1 billion in 2017). This overall market decline hit ad-supported media like broadcast radio and TV especially hard.

[10] Another commenter, REC Networks, raises issues that have already been addressed by other FCC actions or opposed in proceedings dating back a decade or more. *See* Comments of REC Networks, MB Docket No. 18-227 (Sept. 24, 2018). For example, REC claims that the FCC should have required preclusion studies for applications in recent translator auction windows to preserve spectrum for low power FM, *id*. at 3, even though the Media Bureau recently dismissed this very same argument by another LPFM party. *See* Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to Center for Int'l Media Action, *et al*., DA 18-597 (June 8, 2018). REC also calls for using TV channels 5 and 6 for radio. REC Comments at 4-5. NAB has long explained that relocating AM service to channels 5 and 6 is impractical because these channels are already used by other services that cannot easily be relocated. Reply Comments of NAB, MB Docket No. 07-294, at 3-6 (Aug. 29, 2008). This idea is even more problematic now, given that, due to the incentive auction and repack, additional TV stations will be moving to Channels 5 and 6. NAB also strongly objects to REC's inaccurate appraisal of HD Radio. REC Comments at 7-8. As explained in our initial comments, radio stations use HD Radio technology to multicast a variety of program streams, including those airing minority-oriented formats, LGBT-targeted programming, news/sports and niche music formats. NAB Comments at 6. Millions of listeners enjoy the better sound quality of HD Radio, and the availability of HD Radio in cars is expanding quickly. *Id*. at 8 & n. 24. Moreover, REC's attack on allowing FM translators to rebroadcast HD Radio subchannels is entirely misplaced. This innovative use of spectrum has enabled broadcasters to improve service to the public by expanding the reach of valued programming, including local/regional/national sports, news, R&B/soul targeted to African-American listeners, "oldies" music from a wider range of decades appealing to broader audiences, and even an HD4 channel on a station in College Station, TX to be launched in association with the agricultural communications and

II. THE FCC SHOULD DECLINE TO BECOME INVOLVED IN AN UNRELATED LEGISLATIVE DEBATE OVER COPYRIGHT POLICY AND MUST REJECT THE MUSIC INDUSTRY'S ERRONEOUS ARGUMENT THAT CONGRESS' REFUSAL TO ALTER COPYRIGHT LAW MEANS THE LOCAL RADIO OWNERSHIP RULES SHOULD REMAIN UNCHANGED

The Coalitions urge the Commission to opine in its upcoming Report to Congress that "AM/FM Radio should be required to pay music creators for the use of sound recordings," and they argue that the FCC must refrain from loosening the local radio ownership caps because the radio industry does not pay sound recording performance fees.[11] The FCC should reject the music industry's invitation to become involved in a decades-long legislative debate about copyright policy. The Coalitions' and record labels' frustration that Congress has refused to change copyright law by imposing performance rights fees on terrestrial radio stations is not a reason for the FCC to opine on a legislative matter outside the scope of its regulatory jurisdiction and expertise. And third parties' unhappiness over congressional decisions on copyright law is no reason for the FCC to disregard its statutory obligation under Section 202(h) of the 1996 Telecommunications Act to "ensure" that its radio ownership rules "keep pace with the competitive changes in the marketplace."[12]

NAB additionally challenges the Coalitions' claims that AM/FM radio stations have a "huge" competitive advantage over other participants in the audio marketplace because Congress has not imposed performance rights fees on local stations.[13] While copyright law treats different audio outlets differently in this regard, terrestrial radio stations have many

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journalism program at Texas A&M. *See* Inside Radio, *Scanning The HD Radio Dial: Groups Getting It Right* (June 25, 2018).

[11] Coalition Comments at 22, 27-29.

[12] *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 Commission's regulatory framework would keep pace with the competitive changes in the marketplace'") (citing *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004)).

[13] Coalition Comments at 26.

other costs and burdens that do not apply to their marketplace competitors, especially online ones. Every terrestrial radio 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; build, acquire and/or lease and then maintain extensive infrastructure, including transmitters, towers, antennas and real property to house them; comply with FCC regulations ranging from keeping online public files and station logs to providing EAS alerts to preparing quarterly/issues programs lists; and fulfill its statutory obligation to serve its community of license to qualify for renewal of its license every eight years.[14] Above all, FCC-licensed radio broadcasters provide their signals free over-the-air to the listening public. Given these significant costs borne by terrestrial broadcasters but not by internet-based audio providers, current differences in copyright law do not result in AM/FM stations having a "huge" (or perhaps any) competitive advantage and are not a valid reason for the FCC to retain radio ownership caps adopted in the analog era, as the Coalitions contend.[15]

The Coalitions also offer unsupported and questionable claims and make illogical arguments. For example, while admitting that inter-platform competition is "robust" with a "plethora of audio streaming options, YouTube, satellite radio and AM/FM radio," they nonetheless contend that competition within AM/FM radio is limited.[16] This is factually inaccurate, as well as being beside the point. As discussed above, NAB and the broadcast commenters, as well as the Coalitions, showed the breadth and depth of competition in the audio marketplace and the resulting challenges posed to AM/FM broadcasting. But then the Coalitions backtrack, arguing that the supposedly limited competition within the narrow silo

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[14] *See, e.g.*, Comments of Local Community Broadcasters at 3.

[15] *See* Coalition Comments at 22, 26, 29.

[16] *Id*. at 3.

of AM/FM radio, regardless of the "robust" competition across the entire audio marketplace, supports continued retention of ownership restrictions unchanged since 1996. The Coalitions cannot logically have it both ways.

In any event, competition is not lacking within the radio industry. Despite the Coalitions' complaints about excessive consolidation, there are, according to BIA Media Access Pro, 4,721 separate owners of full-power commercial and noncommercial AM/FM radio stations in the U.S., and 7,265 separate owners of all radio outlets (counting full-power, translators and low power FM). The sheer number of radio stations also has greatly increased since 1996, thereby increasing competition for both listeners and advertising dollars.[17] This dispersion of ownership across thousands of stations in the radio industry is in sharp contrast to the recorded music industry, which is dominated by three major record labels.

Moreover, despite the Coalitions' repeated expressions of concern about competitive harms that would allegedly befall small broadcasters if the current ownership caps were loosened,[18] the small radio commenters here strongly support the reform – if not the elimination – of the ownership limits. Sun Broadcasting, the owner of six stations in Florida, and WBOC, the owner of five stations in Maryland, "question whether any local radio ownership restrictions are appropriate given the current competitive landscape,"[19] and other small and mid-sized broadcasters agree that the ownership rules "are outdated" and urge

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[17] From November 1996 to June 2018, the number of full-power AM/FM stations grew nearly 28 percent, from 12,134 to 15,499. The total number of radio stations increased by nearly 47 percent, from 19,788 to 29,072. *See* FCC News Release, *Broadcast Station Totals as of June 30, 2018* (July 3, 2018); FCC News Release, *Broadcast Station Totals as of November 30, 1996* (Dec. 6, 1996). *See* Joint Comments at 3 (observing that radio companies in the same or nearby markets compete fiercely with each other).

[18] *See* Coalition Comments at 6-7, 24, 26.

[19] Comments of Local Community Broadcasters at 5-6 (stating that they also "strongly support NAB's recent proposal" for revising the ownership caps).

the FCC to review them in light of the dramatic changes in the audio marketplace since 1996.[20] NAB finds it unsurprising that radio broadcasters of all sizes support modernizing the radio ownership rules, given that even the so-called "large terrestrial conglomerates"[21] are dwarfed in size by competing audio providers and advertising platforms, including Apple, Amazon, SiriusXM (with or without Pandora), Google and Facebook.[22]

Finally, the Coalitions' claims about the deleterious effects of common station ownership on program diversity are misplaced and inaccurate.[23] It is absurd to complain about a lack of diversity in today's digital marketplace with its virtually infinite listening choices for both music and other audio programming. Studies of the radio industry, moreover, have shown that the increases in common ownership following the 1996 Act "caused an increase in available programming variety," suggesting that "increased concentration has been good for listeners."[24] A number of other empirical studies reached

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[20] *See* Joint Comments at 2. These commenters included four companies that each own between 20 and 75 radio stations and one larger company with 320 stations. *Id*. at 1. Other small radio broadcasters, such as Galaxy Communications, the owner of 15 radio stations in upstate New York, have urged the FCC to "substantially relax the existing local radio ownership caps in all markets." Written *Ex Parte* Communication, MB Docket Nos. 14-50, 09-182, at 2 (Mar. 10, 2017) (attaching an analysis of the declining advertising share of local radio stations in Syracuse, NY market).

[21] Coalition Comments at 7.

[22] *See* NAB Comments at 18-20; *see also* Coalition Comments at 15, 17-18 (noting the growth of Apple Music and the "vast" consumption of music via YouTube and stating that SiriusXM is becoming a "clearer and more present danger to broadcast radio"); Joint Comments at 3-4, 16-17 (discussing importance of economies of scale for broadcasters in current environment).

[23] *See* Coalition Comments at 10-12.

[24] Steven Berry and Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting*, Nat'l Bureau of Economic Research, Working Paper 7080 at 25-26 (Apr. 1999). *Accord* Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q. J. Econ. 1009 (Aug. 2001).

similar conclusions,[25] as did a paper commissioned by the FCC in 2007 evaluating the effects of ownership structures on programming, advertising prices and listenership for terrestrial radio.[26] This study found that (1) consistent with previous studies, "more concentrated markets are associated with more, not less, program variety"; (2) "consolidation of radio ownership does not diminish the diversity of local format offerings"; (3) "[i]f anything, more concentrated markets have less pile-up of stations on individual format categories and large national radio owners offer more formats and less pile-up"; (4) "consolidation in local radio has no statistically significant effect on average listening"; (5) listeners "served by large radio groups, as measured by the number of commercial stations owned nationally by in-market owners, listen more"; and (6) "consolidation in local radio has no statistically significant effect on advertising prices."[27] And a 2010 GAO report found that within individual markets, the top radio formats differ from the top radio formats nationally, "indicating that programming decisions are locally based on the preferences and interests of listeners within a given market."[28] Needless to say, the Coalitions do not address these myriad empirical studies that not only contradict their claims about the harms of common station ownership, but also show that listeners benefit from common ownership.[29]

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[25] *See* Comments of NAB, MB Docket Nos. 06-121, *et al*. at 22 & n. 45 (Oct. 22, 2007) (citing six additional radio studies).

[26] FCC, 2007 Ownership Study No. 5, Tasneem Chipty, CRA International, Inc., *Station Ownership and Programming in Radio* (June 24, 2007).

[27] *Id.* at 40-45.

[28] Government Accountability Office, GAO-10-369, *Media Programming: Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio*, at 28 (Mar. 2010). GAO additionally analyzed data for the top 10 national radio station owners and found that for most owners "stations' formats were differentiated within individual markets." *Id*.

[29] The Coalitions' unmeritorious diversity arguments also rely on a 2006 study by the Future of Music Coalition (FMC) that NAB thoroughly and convincingly refuted in a previous quadrennial review. *See* Coalition Comments at 10-11 & nn. 30, 34, referencing a December

In sum, the Coalitions present no valid reasons why the FCC should refrain from ensuring that its local radio ownership rules fully reflect changes in the audio marketplace since 1996. Certainly Congress's disinclination to impose performance rights fees on radio stations provides no such reason.

III. CONCLUSION

The FCC's upcoming Communications Marketplace Report, and its regulatory policies including the radio ownership rules, must recognize the proliferation of audio content providers and digital advertising platforms and their competitive impact on AM/FM radio stations. There is no valid basis for that Report to opine, at the behest of the music industry, on a legislative matter concerning copyright law.

Respectfully submitted,

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2006 FMC study; NAB Written *Ex Parte*, MB Docket Nos. 06-121, *et al*. (Nov. 1, 2007), attaching Mark R. Fratrik, Ph.D., *A Review of the Future of Music Coalition Study: Missing a Basis in the Reality of the Radio Industry*, BIA Financial Network (Nov. 1, 2007).