

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

In the Matter of	)	
	)	
2022 Quadrennial Regulatory Review	)	MB Docket No. 22-459
	)	
2018 Quadrennial Regulatory Review—	)	MB Docket No. 18-349
Review of the Commission’s Broadcast	)	
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	

**REQUEST TO TOLL THE 2022 QUADRENNIAL REGULATORY REVIEW AND TO  
EXPEDITIOUSLY CONCLUDE THE 2018 QUADRENNIAL REGULATORY REVIEW**

The National Association of Broadcasters (NAB)<sup>1</sup> hereby requests that the Commission temporarily toll the proceeding triggered by the Media Bureau’s recent Public Notice seeking comment on the 2022 quadrennial review of the broadcast ownership rules.<sup>2</sup> Specifically, NAB respectfully requests the FCC to briefly toll its 2022 quadrennial ownership proceeding, including all comment deadlines, until the Commission fulfills its obligation under Section 202(h) of the Telecommunications Act of 1996 (1996 Act) by expeditiously completing the 2018 quadrennial ownership review.<sup>3</sup> NAB strongly urges the Commission to

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<sup>1</sup> 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.

<sup>2</sup> *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). Comments and reply comments are currently due on March 3, 2023, and March 20, 2023, respectively. *Media Bureau Announces Comment and Reply Comment Deadlines for the 2022 Quadrennial Review*, Public Notice, MB Docket No. 22-459, DA 23-38 (Jan. 17, 2023).

<sup>3</sup> See *2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 33 FCC Rcd 12111 (2018) (2018 Quadrennial NPRM).

conclude its long overdue 2018 quadrennial review by the end of the first quarter of this year (2023).

As shown below, failure to timely complete the 2018 quadrennial review violates the direct mandate and clear purpose of Section 202(h). While delaying the ultimate determination of the 2018 review may have made sense given then-pending litigation, the Supreme Court concluded that litigation nearly two years ago. Apart from violating a congressional deadline, an incomplete but still pending 2018 review also makes it challenging, if not impossible, for stakeholders to submit useful and relevant comments to inform a distinct 2022 review. NAB accordingly asks the FCC to expeditiously conclude its 2018 proceeding and *then* move forward with the 2022 review, as Congress intended. Granting NAB's request additionally would enable interested parties to intelligibly comment and participate more effectively in the 2022 review to the benefit of the public and the FCC's examination of the evolving hyper-competitive audio, video, and advertising markets.

#### **I. THE FCC'S FAILURE TO TIMELY CONCLUDE ITS 2018 QUADRENNIAL REVIEW VIOLATES SECTION 202(h)**

Section 202(h), as amended, provides that the Commission "shall" review its broadcast ownership rules "quadrennially"; "shall" determine whether any of them remain necessary in the public interest as the result of competition; and "shall" repeal or modify any regulation no longer in the public interest.<sup>4</sup> Congress's repeated use of the mandatory "shall" imposes an "obligation impervious to . . . discretion."<sup>5</sup> Because Section 202(h) "admits of no discretion on the part of" the Commission "to carry out the directive[s]," the

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<sup>4</sup> 1996 Act, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004).

<sup>5</sup> *Me. Cmty. Health Options v. U.S.*, 140 S. Ct. 1308, 1320 (2020), quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); accord *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress's "use of a mandatory 'shall' . . . to impose discretionless obligations").

statute's mandates, including the requirement for timely reviews every four years, cannot be lawfully ignored or deferred.<sup>6</sup>

More specifically, the Commission has no authority to delay or to forego the 2018 review or to effectively roll that quadrennial review into the required 2022 review. Doing so would violate Section 202(h)'s directives for the Commission "quadrennially" to "review" its ownership rules, "determine" their necessity, and "repeal or modify" those no longer needed. The Third Circuit Court of Appeals previously found such a course contrary to Section 202(h) and congressional intent when the Commission, rather than completing the delayed 2010 review, began its 2014 review instead.<sup>7</sup>

In explaining its initiation of the 2022 quadrennial while failing to conclude the past due 2018 review, the Public Notice (at n.2) observed that the Commission had "similarly initiated" the 2014 quadrennial review before completing the 2010 review. But the Public Notice overlooks the Third Circuit's previous disapproval of that very maneuver in *Prometheus III*. While neglecting to mention *Prometheus III*, the Public Notice (at n.2) also apparently – and unsuccessfully – attempts to distinguish the FCC's current action from its 2014 action, stating that in 2014, the "Commission incorporated the existing 2010 record into the 2014 review[,] [and] "[h]ere, the Media Bureau is creating a new docket" for the

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<sup>6</sup> *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007), quoting *Ass'n of Civil Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive."); accord *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (*Prometheus III*) (characterizing the repeated use of the word "shall" in Section 202(h) as "unmistakably mandatory" and "creat[ing] 'an obligation impervious to . . . discretion'" (quoting *Lexecon Inc.*, 523 U.S. at 35). See also, e.g., *Amendment to the Commission's Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574, 6575 ¶ 1, n.6 (2015) (indicating that Congress's direction that the FCC "shall complete a rulemaking to establish a streamlined process for filing of an effective competition petition" means the FCC "must" complete the rulemaking in the time allotted).

<sup>7</sup> *Prometheus III*, 824 F.3d at 50-51.

FCC's consideration of the 2022 review. But in fact, the FCC in 2014 created a new docket (MB 14-50) for its consideration of the 2014 review, which differed from the 2010 review's docket (MB 09-182). In any event, putting a new number on a docket for the 2022 quadrennial review (regardless of whether the previous quadrennial's record is incorporated into the new docket or not) in no way satisfies Section 202(h)'s dictates to the Commission to "review" its rules, "determine" their necessity, and "repeal or modify" any unnecessary ones every *four years*. The logic of the FCC's position here suggests that the Commission could withhold a decision on the 2018 or other quadrennial review; it only would need to leave any previous review(s) pending and initiate a new review every four years – a result clearly at odds with Section 202(h)'s terms and purpose.<sup>8</sup>

Indeed, while the calendar now says 2023, the 2014 quadrennial remains the last review completed. Since that time, competition in the media and advertising markets has grown quickly and substantially, resulting in increasing dominance by large and unregulated digital platforms.<sup>9</sup> As multiple courts, including the Supreme Court, have indicated, failure to

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<sup>8</sup> See *Prometheus III*, 824 F.3d at 50 (stating that the "very purpose of § 202(h) – to function as an ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace – reinforces the need for timeliness") (internal citation omitted). The D.C. Circuit similarly concluded that the FCC's avoidance of ruling on the merits of a forbearance petition was contrary to another section of the 1996 Act, whose "very purpose" was "to force the Commission to act" – even if "inconvenient" – "within the statutory deadline." *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006).

<sup>9</sup> See, e.g., *2020 Commc'n Marketplace Report*, 36 FCC Rcd 2945, 3047 (2020) (finding that the "past two years have seen a number of changes in terms of competition" among the three major participants (MVPDs, OVDs, and broadcast TV stations) that have "defined the [video] market for the past decade"); *2022 Commc'n Marketplace Report*, GN Docket No. 22-203, FCC 22-103, at ¶¶ 280, 289 (Dec. 30, 2022) (noting the "ascendance of OVDs" in the video marketplace and documenting that in 2021, broadcast TV stations' local advertising revenues fell to \$9.7 billion while online local ad revenues grew to \$65 billion); *id.* at ¶ 303, Fig. II.F.3, ¶ 328 (documenting that over the past decade, *annual* growth in online audio listeners was 29 percent, and that radio industry advertising revenues in 2020 and 2021 fell even further behind the industry's revenue levels reached 15 years earlier).

timely conclude the 2018 quadrennial review is contrary to the FCC's duties to "regularly reassess" how its ownership rules function to "keep pace" with industry developments and the marketplace,<sup>10</sup> and to "promptly" repeal or modify any unnecessary rules.<sup>11</sup> And the Public Notice (at 1) acknowledges that the "media marketplace can change dramatically in between [] periodic regulatory reviews," which makes the FCC's failure to timely conclude the 2018 review in accordance with Section 202(h) even more problematic.

The record in the 2018 proceeding, moreover, is complete and undoubtedly ripe for review. Numerous parties, including NAB, spent considerable time, effort, and expense in commenting in Spring 2019 and then submitting supplemental comments and reply comments on September 2 and October 1, 2021, respectively, at the FCC's request.<sup>12</sup> The Commission has no basis for flouting Section 202(h)'s clear directive, or the Administrative

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<sup>10</sup> *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1156 (2021) (stating that § 202(h) established an iterative process requiring the "FCC to keep pace with industry developments and to regularly reassess how its rules function" in the market); accord *Prometheus III*, 824 F.3d at 50 (emphasizing that "timeliness" is needed if Section 202(h) is to fulfill its function to ensure that the FCC's regulations "keep pace" with competitive changes in the market) (internal citation omitted).

<sup>11</sup> *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir.), modified on reh'g on other ground, 293 F.3d 537 (D.C. Cir. 2002) (referring to the FCC's "statutory mandate promptly – that is, by revisiting the matter biennially [now, quadrennially] – to 'repeal or modify' any rule that is not 'necessary in the public interest'"); see also *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (stating that the FCC's "wait-and-see approach" on TV station ownership could not be "squared with the statutory mandate" to repeal or modify any rule not necessary in the public interest) (citation omitted).

<sup>12</sup> *Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, Public Notice, 36 FCC Rcd 9363 (MB 2021) (2018 Quadrennial Update Public Notice); see Comments of NAB, MB Docket No. 18-349 (Sept. 2, 2021) (NAB 2021 Comments); Reply Comments of NAB, MB Docket No. 18-349 (Oct. 1, 2021) (NAB 2021 Reply Comments); Comments of NAB, MB Docket No. 18-349 (Apr. 29, 2019) (NAB 2019 Comments); Reply Comments of NAB, MB Docket No. 18-349 (May 29, 2019) (NAB 2019 Reply Comments). NAB again addressed questions of competition in the audio, video, and advertising markets, and the effects of that competition on broadcast stations, in the FCC's 2022 proceeding on competition in the communications marketplace. See Comments of NAB, GN Docket No. 22-203 (July 1, 2022) (NAB Commc'n Market Comments); Reply Comments of NAB, GN Docket No. 22-203 (Aug. 1, 2022) (NAB Commc'n Market Reply Comments).

Procedure Act, by defaulting on its duty to complete the 2018 review within the statutory deadline.<sup>13</sup> Certainly the reasons offered in the Notice (or any other reason) cannot excuse the FCC's failure to comply with a congressional mandate.<sup>14</sup> NAB therefore implores the FCC to finalize the 2018 review by March 31, 2023, and then proceed with the 2022 quadrennial so that review is concluded in at least a somewhat timely fashion, consistent with Section 202(h).<sup>15</sup>

## **II. THE FCC NEEDS TO TEMPORARILY TOLL THE 2022 QUADRENNIAL OWNERSHIP REVIEW UNTIL IT RESOLVES THE 2018 REVIEW**

Beyond concluding the 2018 review, the Commission also should briefly toll the 2022 review until the prior review is completed. As an initial matter, stakeholders will find it challenging at best to submit specific, relevant, and useful comments in response to the generic Public Notice initiating the 2022 review. In this regard, the Commission asked – and NAB, along with other stakeholders, addressed – as part of the 2018 quadrennial a number

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<sup>13</sup> See 5 U.S.C. § 706(1) (providing that a “reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed”).

<sup>14</sup> The Public Notice (at 2-3) noted the extensive litigation that followed the FCC's 2017 decision reconsidering its order that had belatedly completed the 2010/2014 quadrennial reviews. But the Supreme Court released its decision unanimously upholding that reconsideration order on April 1, 2021. Thus, the FCC has had ample time to conclude its 2018 review. The Public Notice also attempted (at 1) to justify the timing of the initiation of the 2022 review. Although it did initiate the 2018 review in December of that year, the FCC in 2018, unlike in 2022, had not failed to complete its previous quadrennial review. It also began the 2018 review with a notice of proposed rulemaking adopted by the full FCC, rather than with a generic Bureau-level public notice. Given that the Commission cannot repeal or modify rules on the basis of such a public notice, the Bureau's last-minute launch of the 2022 review raises doubts as to whether it can be concluded within a reasonable time.

<sup>15</sup> NAB also implored the Commission in our 2021 supplemental reply comments to comply with Section 202(h) and expeditiously conclude the 2018 review. NAB 2021 Reply Comments at 6-7. As the FCC's outdated regulations prevent broadcasters from competing on a remotely level playing field, NAB even suggested that the FCC, if it continued to decline to decide the 2018 review, begin its 2022 review as early as possible and complete it within a year (i.e., by the end of 2022). See *id.* at n.10. Obviously, the Commission has done neither, and both reviews are now guaranteed to be unacceptably tardy.

of the questions posed and issues raised in the Public Notice, again indicating that the FCC could and should answer those questions by completing the 2018 review.<sup>16</sup>

The Public Notice also asked for comment on the “three rules currently in place and subject to this [2022] review,” even though “they remain subject” to the incomplete and still “pending” 2018 review.<sup>17</sup> But how are stakeholders supposed to intelligibly comment for purposes of the 2022 quadrennial review on rules subject to change in a previous unfinished review? In the 2022 quadrennial, interested parties should be commenting on the ownership rules in light of the FCC’s final decisions in its 2018 review and how those decisions affected marketplace competition. That is why Congress established an “iterative process” in Section 202(h),<sup>18</sup> and why the FCC’s failure to timely conduct and conclude its required reviews upends the entire statutory scheme. Neither the Commission nor interested stakeholders can “gain experience” with any FCC policies adopted in the 2018 quadrennial, or assess in the 2022 review how any rules modified by the 2018 review

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<sup>16</sup> For example, the Public Notice (at 3-4) asked for comment on minority and female ownership of broadcast stations, an issue referenced in the 2018 Quadrennial Update Public Notice, 36 FCC Rcd at 9366, and addressed at length in the rulemaking notice initiating the 2018 review. 2018 Quadrennial NPRM, 33 FCC Rcd at 12127, 12138-39, 12145-55. In similar language, the Public Notice (at 3) and the 2018 Quadrennial Update Public Notice, 36 FCC Rcd at 9366, sought information on consolidation, technological innovation/change, and the emergence of online audio and video options/sources. The Public Notice (at 3) asked about “changes in consumer behavior (e.g., use of streaming alternatives)” that the 2018 Quadrennial NPRM had documented. See 33 FCC Rcd at 12112-13, 12129 & n. 145. And the FCC has asked multiple times about areas in which consumers rely heavily or uniquely on broadcast media, such as for news and information. See Public Notice at 3; 2018 Quadrennial Update Public Notice, 36 FCC Rcd at 9366-67; 2018 Quadrennial NPRM, 33 FCC Rcd at 12131-32. NAB addressed these and many other issues in comments, data, and studies submitted in 2019, 2021, and 2022. See NAB 2019 Comments; NAB 2019 Reply Comments; NAB 2021 Comments; NAB 2021 Reply Comments; NAB Commc’n Market Comments; NAB Commc’n Market Reply Comments.

<sup>17</sup> Public Notice at 3 (identifying the local radio, local TV, and dual network rules).

<sup>18</sup> *FCC v. Prometheus Radio Project*, 141 S. Ct. at 1156; *Prometheus Radio Project v. FCC*, 939 F.3d 567, 593 (3d Cir. 2019) (Scirica, J., dissenting in part), *reversed*, 141 S. Ct. 1150 (2021) (*Prometheus IV*).

“function in the marketplace,” as Congress intended, because the Public Notice requests comment in the 2022 quadrennial while the 2018 review remains unresolved.<sup>19</sup>

Notably, the FCC’s approach here risks turning either the 2018 or the 2022 quadrennial into a pointless and burdensome exercise for stakeholders. By setting deadlines for interested parties to comment in the 2022 review on the ownership rules as they exist today (i.e., prior to completion of the 2018 review), the Public Notice implies the Commission is not likely to alter those rules as a result of the 2018 quadrennial, when (or if) that review is eventually resolved. NAB finds it inherently unlikely that the FCC, after parties submit comments and supporting evidence for the 2022 review, would return to the 2018 quadrennial to seriously consider its rules in light of competition and “repeal or modify” any of them based on the earlier record in the 2018 proceeding. Thus, it seems possible, if not probable, that NAB and other stakeholders expended significant time and resources to prepare multiple sets of comments, data, and studies in the 2018 proceeding for no real purpose.<sup>20</sup> But in the event the FCC were to retroactively complete and change its rules pursuant to the 2018 quadrennial following the submission of comments and empirical evidence for the 2022 review, then those parties participating in the 2022 review would have unnecessarily expended time and resources analyzing and commenting on ownership rules and policies that became outdated after all their work. In short, if the Commission does not grant NAB’s request to toll the 2022 quadrennial until the expeditious completion of the 2018 proceeding, it will effectively undermine the public’s participation and waste participating parties’ resources in either the 2018 or the 2022 proceeding.

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<sup>19</sup> The “iterative process” Congress prescribed in Section 202(h) “assumes the FCC can gain experience with its policies so it may assess how its rules function in the marketplace.” *Prometheus IV*, 939 F.3d at 593 (Scirica, J., dissenting in part).

<sup>20</sup> See NAB 2019 Comments and Attachments A-I; NAB 2019 Reply Comments; NAB 2021 Comments and Attachments A-M; NAB 2021 Reply Comments and Attachment A.



NAB stresses that participating in quadrennial ownership reviews and submitting data and studies, as the Commission strongly urges,<sup>21</sup> is burdensome and expensive for stakeholders. These proceedings are not costless exercises. In NAB's experience, economic and other empirical studies are particularly costly to undertake, often requiring the hiring of outside economists, industry analysts, or other experts. Beyond failing to comply with statutory deadlines for the 2018 quadrennial, it is manifestly unfair and inappropriate for the Commission to pursue a path under which the efforts of regulated entities and other interested parties to prepare comments, gather (and perhaps pay to acquire) data, and conduct costly studies would be for naught.

Beyond abdicating its statutory responsibilities and burdening stakeholders with various rounds of unaddressed comments, the FCC's failure to complete the 2018 review is particularly egregious given the hundreds of millions of dollars paid by broadcasters in regulatory fees, which supposedly reflect the "benefits" conferred on the broadcast industry from Commission work. Indeed, radio and TV stations have paid approximately \$230,421,000 in regulatory fees to fund much of the Media Bureau's and other FCC activities while the 2018 review has been pending (i.e., from December 2018 until today). Despite these exorbitant fees, broadcasters have not "benefitted" – but in fact have been harmed – from the FCC's inability to perform its statutorily-mandated and high-priority quadrennial reviews.<sup>22</sup> As such, the Commission should take into account the evident lack

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<sup>21</sup> Public Notice at 1, 4 (stating that "we welcome" "economic studies and data collection" as part of the 2022 proceeding; requesting that "commenters submit empirical evidence, data, and studies in support of their claims and positions wherever possible"; and "encourag[ing]" commenters to "compile new data or to conduct further research"); *accord* 2018 Quadrennial Update Public Notice, 36 FCC Rcd at 9366, 9368.

<sup>22</sup> See 47 U.S.C. § 159(d) (directing the FCC to amend its regulatory fee schedule if required so that those fees reflect the full-time equivalent number of employees within the bureaus and offices of the Commission, "adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities").

of meaningful work on quadrennial reviews since 2018 as it considers assigning dozens of full-time equivalent employees to broadcasters' direct full-time equivalent ledger for determining stations' regulatory fees in 2023.

For all these reasons, NAB requests the Commission to toll its 2022 quadrennial ownership review proceeding, including all comment deadlines, until it fulfills its duty under Section 202(h) by completing the mandated 2018 quadrennial review. The FCC has no lawful basis for withholding the belated 2018 review and NAB requests its completion by the end of the first quarter of 2023. Continuing to refrain from resolving the 2018 review, while appearing to initiate the 2022 review and requesting comments, data, and studies from interested parties, is contrary to the terms of Section 202(h) and congressional intent, and places undue burdens on stakeholders' effective participation in the quadrennial review process. Given the existing analog-era ownership rules' negative competitive impact on our radio and TV station members, NAB urges the FCC to act expeditiously on our requests.

Respectfully submitted,

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