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

In the Matter of	)	
	)	
Amendment of Section 73.3556 of the	)	MB Docket No. 19-310
Commission's Rules Regarding Duplication of	)	
Programming on Commonly Owned Radio Stations	)	
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105

PETITION FOR RECONSIDERATION OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Pursuant to Section 1.429 of the Commission's rules,[1] the National Association of Broadcasters (NAB)[2] seeks reconsideration of the Commission's recent grant[3] of a nearly four-year-old Petition for Reconsideration[4] of the Report and Order[5] that eliminated the radio duplication rule for FM radio service (FM Duplication Rule).[6] As discussed below, NAB requests reconsideration because the Commission has no basis to reverse its initial judgment in this proceeding and willfully turned a blind eye to conducting any research –

[1] 47 C.F.R. § 1.429.

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

[3] *Amendment of Section 73.3556 of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations; Modernization of Media Regulation Initiative*, MB Docket Nos. 19-310 and 17-105, Order on Reconsideration (June 10, 2024) (Reconsideration Order).

[4] Petition for Reconsideration, REC Networks, musicFIRST Coalition, and Future of Music Coalition, MB Docket Nos. 19-310 and 17-105 (Nov. 20, 2020) (Reconsideration Petition or Petition).

[5] *Amendment of Section 73.3556 of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations; Modernization of Media Regulation Initiative*, Report and Order, 35 FCC Rcd 8383 (2020) (Order).

[6] 47 CFR § 73.3556.

including seeking any updated comment after waiting nearly four years to act – into whether the Petitioners' doomsday claims of rampant FM service duplication have come to pass. As a result, the FCC lacks reasonable grounds for granting the Reconsideration Petition.

I. The Commission Fails to Justify Granting the Recon Petition

The FCC issued the Order eliminating the radio duplication rule in August 2020. The Reconsideration Petition was filed in November 2020. For some reason, beyond putting the Petition out for general comment in early December 2020, the Commission did not address the issue in any way until producing the Reconsideration Order in June 2024. Thus, the FCC granted the Reconsideration Petition based only on the record before the Commission at the time of the initial Order as well as the generic request for responses to the Petition. The Commission goes to great lengths to find reasons why it should reverse course, yet in reality offers nothing new and worse, does so without having any understanding of the current state of the marketplace.

A. The Commission Turns the Petition for Reconsideration Standard on Its Head

The FCC rejects NAB's assertion that the Reconsideration Petition should be denied because it did not raise any new issues or arguments that were not already addressed in the Order.[7] The Reconsideration Order points to Commission precedent that reconsideration is "generally appropriate where the petitioner shows either a material error or omission in the original order."[8] The Commission then reasons that it has the ability to reconsider the Order here because the material error is that the Order itself was wrongly decided.[9]

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[7] Reconsideration Order at ¶ 11.

[8] *Id*. citing *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd 3390, 3396 (2017) (2016 UHF Discount Order).

[9] *Id*. at ¶ 11.

This new interpretation is a departure from Commission precedent. While the Commission cites its reconsideration of the 2016 UHF Discount Order as support, in that reconsideration order, the Commission granted the petition finding "that the Commission failed to fully consider important arguments and lacked a reasoned basis for its conclusion that action on the discount should not be combined with a broader review of the national cap."[10] Thus, the Commission did not simply conclude, as it does here, that a sufficient basis for reconsideration is that it simply desires a different conclusion.

Indeed, were the FCC to adopt this new approach to petitions for reconsideration, the standard would amount to no standard at all. Whenever the Commission believes its prior conclusion was incorrect – most notably when there is a change in Administration – it can simply entertain a petition for reconsideration and reverse course on the same facts and without any satisfactory explanation as to the specific material *errors* made in the order under consideration.

B. Despite Having Nearly Four Years of Experience Under the Changed Rules, the Commission Did Not Even Seek Comment on the New Duplication Landscape

The most egregious error the Commission makes in this proceeding is failing to even question if any changes in the marketplace had come to pass in the extended period during which the Petition was under consideration.

As the Commission notes, in reaching its original decision in 2020, the agency relied on its predictive judgment as to whether the removal of the FM Duplication Rule would trigger stations to begin duplicating programming in the same market in a manner that would harm the public interest. The Order reasoned that "broadcasters have no incentive to limit their appeal and thus their revenues by simulcasting the same programming on

[10] 2016 UHF Discount Order, 32 FCC Rcd at 3397.

multiple stations for long periods of time" and that the Commission "believe[s] that licensees will prefer to maximize the potential for their stations to reach the greatest number of listeners with the greatest amount of programming."[11] At the time, as with many, if not most Commission rulemakings, the Commission had to rely on that judgment because the very rule the Commission sought to reform prevented broadcasters from duplicating programming.

The primary – if not lone – benefit of waiting four years to address the Petition for Reconsideration is that the Commission could evaluate whether the Commission's or the Petitioners' view of the world has come to pass. Put differently, in 2024, the Commission was in a position to test the Order's central concept, namely, "we do not believe that duplication will be a common practice by station owners as a substantially increased amount of it is unlikely to be well-received by the marketplace."[12]

But importantly, the Commission did not even bother putting out a request for comment on that specific score. The only opportunity to comment was the standard comment permitted where the Commission seeks general comment on any petition for reconsideration. As the Consumer and Governmental Affairs Bureau offered:

> A Petition for Reconsideration has been filed in the Commission's proceeding listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of this document is available for viewing on the ECFS data base, https://www.fcc.gov/ecfs/. Oppositions to the petition must be filed within 15 days of the date of publication of this public notice in the Federal Register. See Section 1.4(b)(1) of the Commission's rules (47 CFR § 1.4(b)(1)).

[11] Order at ¶ 16.

[12] *Id.*

> Replies to an opposition must be filed within 10 days after the time for filing Oppositions has expired.[13]

In the intervening YEARS following this announcement, neither the Commission nor the Media Bureau through a public notice ever bothered to either seek comment or do its own research on the effect, if any, of the FM Duplication Rule being rescinded. It defies logic that the Commission would not bother to inquire into the current state of affairs and attempt to base any reconsideration on real-world data.

The best answer the Commission can come up with is that "NAB" did not meet some duty we now apparently have to produce this evidence. Remarkably, the FCC tries to shift its burden to the radio industry, stating that NAB noted in a recent filing that the duplication rule was eliminated years ago, "thus providing an opportunity to assess whether stations increased duplication after elimination of the rule," but "NAB provides no evidence on this point or otherwise refutes or counters the information in the record."[14] However, it is not the public's responsibility to proactively refresh a record, especially in a case like this, where the Order endorsed our view of the issue and the entities seeking reconsideration submitted no new factual information or arguments that required further debate beyond our opposition to the Reconsideration Petition.[15] Does the FCC believe that outside parties should update a favorable record based solely on rumors that the FCC may take up a long dormant petition? Moreover, since NAB had no actual evidence of any station now duplicating FM

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[13] Public Notice, *Petition for Reconsideration of Action in Proceeding*, Report No. 3164 (Dec. 8, 2020).

[14] Reconsideration Order at ¶ 14 n.53.

[15] National Association of Broadcasters Opposition to Petition for Reconsideration, MB Docket Nos. 19-310 and 17-105 (Jan. 5, 2021).

programming (our point), what evidence exactly is the broadcast industry supposed to submit?

The Commission also argues without irony the "bare assertions" it believes underlie the Order while also tacitly admitting that the Reconsideration Order itself is based on "bare assertions."[16] Again, the original Order was forced to rely on the FCC's predictive judgment because one could not produce definitive evidence of what was to come if the rule was removed. For that, the Commission can certainly be excused. But here, the FCC could have easily relied on more than its predictive judgment, yet did not lift a finger to explore that avenue. Instead, without justification, it again relied on the bare assertions of the music industry. To have failed to in any way seek a meaningful record on reconsideration is arbitrary and capricious and contrary to law.[17]

Finally, refreshing the record after such a long time would have been consistent with Commission actions in other proceedings. For example, USTelecom filed a petition in 2012 urging the Commission to declare incumbent local exchange carriers "no longer presumptively dominant when providing interstate mass market and enterprise switched

[16] Essentially, the Commission now believes its current bare assumptions are better than its old bare assumptions.

[17] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) citing *Burlington Truck Lines, Inc*. v. *United States*, 371 U.S. 156, 168 (1962). *See also Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1113 (D.C. Cir. 2019) (stating that although a "court must give appropriate deference to predictive judgments by an agency where supported by substantial evidence," the FCC here "referred to no evidence" to support its summary conclusion); 5 U.S.C. § 553.

access services."[18] The Bureau sought comment on the petition at the time.[19] Subsequently, in 2016, the Bureau issued a Public Notice to refresh the record "on marketplace or regulatory developments, since the filing of the Petition, that may bear on the Commission's evaluation of the Petition," and encouraged "commenters to address further the practical impact and scope of the finding sought by the Petition."[20] The Commission has also sought to refresh records after much shorter periods of time.[21]

C. The Commission's Recent Spate of "Comment Math" Is Not Illuminating

There has been a somewhat disturbing recent trend in broadcast-related FCC rulemakings where the Commission seems to believe there is some value in tallying the sheer number of comments in support of or against a particular proposal. Here, presumably as support for granting the Petition, the Commission states, "only a single commenter---NAB--advocated for the elimination of the rule with regard to FM service."[22] Apart from the fact that there were only a total of FIVE commenters in the entire initial proceeding, NAB

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[18] Petition for Declaratory Ruling of USTelecom that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services, WC Docket No. 13-3 (filed Dec. 19, 2012).

[19] Public Notice, *Wireline Competition Bureau Seeks Comment on United States Telecom Association Petition for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services*, 28 FCC Rcd 107 (2013).

[20] Public Notice, *Wireline Competition Bureau Seeks Comment to Refresh the Record on United States Telecom Association Petition for Declaratory Ruling*, 31 FCC Rcd 254 (2016).

[21] *See e.g.,* Public Notice, *Wireline Competition Bureau Seeks to Refresh Record on Improving Competitive Broadband Access to Multiple Tenant Environments*, 36 FCC Rcd 13441 (2021) (refreshing two-year-old record to help FCC "better understand" how it could facilitate broadband access in MTEs); Public Notice, *Consumer & Governmental Affairs Bureau Seeks to Refresh Record on Assigning Internet Protocol-Based Telecommunications Relay Service Users Ten-Digit Telephone Numbers Linked to North American Numbering Plan and Related Issues*, 23 FCC Rcd 4727 (2008) (refreshing record on issues identified in a two-year-old FNPRM).

[22] Reconsideration Order at ¶ 12.

represents THOUSANDS of radio broadcasters. Those broadcasters rely on NAB to register their views at the Commission in lieu of spending duplicative effort and expense on the wide array of Media Bureau rulemakings. Therefore, any comments from NAB have the imprimatur of a substantial portion of the broadcasting industry. To suggest, therefore, that the sheer number of comments is somehow indicative of the level of substance or import of the filings is disingenuous and misleading.[23]

D. The FCC Places Too Much Weight (and Faith) in Its Waiver Process

In the Order, the Commission determined that one reason for sidelining the FM Duplication Rule was because there may be emergency situations that arise where stations need flexibility to duplicate programming without having to bear the costs and delays of pursuing a rule waiver.[24] In the absence of any evidence suggesting that the rule was needed, including evidence of any incentives stations would have to nefariously duplicate programming, facilitating more flexibility to deal with unforeseen circumstances is certainly in the public interest.

In the Reconsideration Order, however, the FCC flip-flops, finding that eliminating the rule is not needed to sufficiently allow stations to react quickly to emergencies, and that the waiver process does not entail costs or delay so unreasonable as to outweigh the potential benefits of restoring the rule.[25] It seems to be a trend in FCC broadcasting-related orders to

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[23] The FCC even suggests (without sarcasm) that "[m]ost commenters in the proceeding did not support eliminating the radio duplication rule as to FM service." Reconsideration Order at ¶ 12 n.42 (citing Reconsideration Order at ¶ 5 n.22, which notes that "four parties . . . submitted comments"). Of those "four parties," one (NAB) supported elimination, two did not, and one did not address the issue. This is hardly a basis to find import in the fact that "most commenters" (i.e., two versus one) did not support eliminating the rule at issue.

[24] Order, 35 FCC Rcd at 8390.

[25] Reconsideration Order at ¶ 17.

assume that the waiver process is simple, efficient, and effective.[26] Given that waivers are entertained at the whim of Commission staff – and could be processed or not based on other requests, vacation schedules, downgrades in a particular policy priority, for example – the theoretical availability of a waiver is of no moment.

II. The Commission's Claims Affirmatively Supporting Its Reconsideration Order Are Specious

Petitions for reconsideration are not granted if the "petitioners' arguments do little more than disagree with [the FCC's] analysis, judgments, and policy choices."[27] The Petition for Reconsideration provides little support for the Commission's Reconsideration Order. Indeed, the Petition – the only document on which the Commission sought comment – dedicates a scant *three* pages to arguments concerning the substance of the rule change, yet *10* to its frivolous Administrative Procedure Act (APA) claims that the Commission did not even meaningfully entertain.[28] The Petition argues for reversing the Order on three substantive grounds:

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[26] *See, e.g.*, *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, MB Docket No. 18-349 (Dec. 26, 2023) (2018 Quadrennial Review), at ¶ 85 (retaining the prohibition on common ownership of two stations ranked in the top four of audience share in a market, along with the ability to allow such combinations on a case-by-case basis); *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930 (establishing a waiver process of the local simulcasting and coverage requirements for stations seeking to transition directly from ATSC 1.0 to ATSC 3.0 service without providing a 1.0 simulcast).

[27] *Amendment of Parts 2 & 25 of the Commission's Rules to Permit Operation of Ngso Fss Sys. Co-Frequency with Gso & Terrestrial Sys. in the Ku-Band Frequency Range*, Fourth Memorandum Opinion and Order, 18 FCC 8428, 8450 (2003).

[28] The Commission avers that, because it "conclude(s) that Petitioners make convincing arguments on the merits . . . we need not reach Petitioners' separate arguments about whether to reinstate the rule based on alleged inadequacies in the process by which the rule was eliminated." Reconsideration Order at ¶ 11 n.41. The reality is that the Order fully

- "Elimination of the FM portion of the Radio Duplication Rule can be expected to harm ownership diversity, viewpoint diversity and program diversity resulting in a reduction of local programming of news and information, music, religious programming, sports, and/or other forms of content that would otherwise enrich the lives of local listeners."[29]

- "The elimination of the FM portion of the rule can also be expected to harm competition in radio. To the extent that larger clusters are allowed to slash programming costs by eliminating programming on one or more FM stations within a given single market, yet continue to sell advertising on such warehoused spectrum, it follows that competing independent radio stations in that shared market cannot take advantage of similarly drastic economies of scale."[30]

- "Eliminating the FM portion of the Radio Duplication Rule would allow owners of clusters of stations to literally reduce the number of local voices on FM airwaves. This would necessarily harm localism on the airwaves in markets where station owners take advantage of such an unnecessarily broad deregulatory measure."[31]

The first of the three claims just repeats sweeping Commission goals. Neither the Petition for Reconsideration nor any subsequent filing in the intervening years substantiates these claims in any way. Has there been a reduction in local programming of news and information as a result? Is less music or religious or sports programming being broadcast? Petitioners do not even claim this is the case. They only assume this will happen, but again,

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complied with the APA, as all notice and comment thresholds were easily met. *See, e.g.*, *Amendment of Section 73.3556 of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations Modernization of Media Regulation Initiative*, MB Docket Nos. 19-310 and 17-105, 34 FCC Rcd 11544, 11546 (2019) ("We invite comment on whether we should modify or eliminate the radio duplication rule contained in section 73.3556 of our rules.").

[29] Reconsideration Petition at ¶ 4.

[30] *Id.*

[31] *Id.* at ¶ 5.

the Commission had four years to evaluate these claims and nothing in the record suggests these Y2K-like predictions have come to pass.

The same can be said of the Petition's second assertion, which the Commission also directly credits in the Reconsideration Order.[32] How has competition been harmed? Indeed, the FCC just recently released its comprehensive 2018 Quadrennial Review of its broadcast ownership restrictions as well as a 2022 Communications Marketplace report, and nowhere does the Commission suggest that somehow the elimination of the FM Duplication Rule has led to a decrease in competition.[33] To beat a dead horse, there is zero evidence in the record that any station group has taken advantage of the FM Duplication Rule's elimination, and thus there is no evidence that station groups are selling advertising to support a duplicative station. Of course, any cursory understanding of advertising sales makes clear that advertisers are not seeking to advertise on stations playing the same exact playlist; but rather, they seek to diversify the audiences that are exposed to their messages.

Indeed, all evidence before the Commission suggests the opposite. The Commission points to nothing – nor can it – that suggests that broadcasters cut costs by duplicating any amount of programming (even under the 25% threshold) on a commonly-owned station in the same market. If anything, duplicative programming would only split listeners between two stations in the same market, making them *both* less valuable and in turn forcing them to charge *less* for advertising spots. There is no plausible economic argument that any station would benefit by simply duplicating programming in the same market to cut costs.

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[32] Reconsideration Order at ¶ 13.

[33] *See* 2018 Quadrennial Review; *Communications Marketplace Report*, GN Docket No. 22-203, 37 FCC Rcd 15514 (2022).

The final argument the Petition proffers in its stirring three pages is that duplication will lead – notice, nowhere do the Petitioners state in the Petition or subsequent filings, "has led" – to "literally" reducing the number of local voices on FM airwaves. Again, the very statement highlights the flimsy nature of the argument. *First*, neither the Petition (nor subsequent record) presents any evidence not only that any stations are duplicating programming as a result of the Order, but also – and necessarily – that those that are provide decidedly *local* service in the first instance. The FCC compounds this mistake by championing this line of thinking in the Reconsideration Order. The Commission quotes the Petition, stating "we share Petitioners' concerns . . . due to potential reduction of 'local voices on local airwaves' providing 'locally relevant programming.'"[34] This completely jumps the shark. Not only does the Commission fail to identify why the rule change would somehow target "local voices," and not, for example, music owned by the large record companies behind the Petition and played around the world, the Commission cannot point to a single example of where this has come to pass over the last four years since the rule's demise. At bottom, the Commission is merely throwing out buzzwords like "local" as if that somehow ends the discussion without a scintilla of evidence or plausible rationale.

Second, neither the Petition nor the Reconsideration Order makes any attempt to quantify how many local voices are the right number of local voices. For example, while there would technically be less voices if a market went from 100 stations broadcasting unique material to 99 stations (because of one offering duplicative programming), does that represent any meaningful loss of local programming or programming at all?

[34] Reconsideration Order at ¶ 13 (quoting Reconsideration Petition at 5).

Third, and relatedly, neither the Petition nor the subsequent record suggests anything about the kinds of markets, if any, in which broadcasters would race to duplicate programming. Would this be rampant everywhere? Are larger markets more likely to start homogenizing[35] programming more significantly than small ones? There is not even a hint of anything specific that would support the Commission reversing course.

Finally, the Commission runs one other thought up the flagpole that is similarly hollow. The Reconsideration Order argues that "duplication of programming is an inherently inefficient use of spectrum."[36] To support this notion in practice, the Commission relies on a commenter in the initial proceeding (that notably did not respond to the Petition for Reconsideration, however), Kern Community Radio (Kern). The Commission found persuasive Kern's claim that "in addition to the rebroadcast of programming being imported from outside the market, duplication also is occurring in its local market of Bakersfield, California."[37] Apparently, the Commission did not bother to check up on the relevance and/or accuracy of Kern's declaration.

In its six-page reply comments in 2020, Kern states:

> Bakersfield, a metropolitan area of roughly 840,000 people, does not have one local-studio secular, non-commercial radio station. That includes no secular LPFM, no local-content NPR station, no community station, or no college station. The entire non-commercial FM band except for one station is all relayed via satellite from chiefly religious broadcasters from Texas, Idaho, and Northern California. This has locked-out any new local non-commercial broadcasters. And none of these broadcasters cover any local issues, or are required to cover any local issues. Christian satellite broadcaster Educational Media Foundation has five frequencies (K245CJ, K285GG, K284AO, KAID, KBLV) in the

[35] The Petition did, however, helpfully point out that "[t]he antonym of diversity is homogeneity." Petition at 4.

[36] Reconsideration Order at ¶ 14.

[37] *Id.*

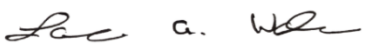
> Bakersfield area, with translators contravening Section 74.1232(b) of the translator duplication rules. Calvary Satellite Network also has four rimshot translators (K207DJ, K219LN, K259CA, K214ED) possibly breaking the same rule. We are not sure if the FCC is even enforcing Section 74.1232(b).

It does not take more than a cursory review to notice that Kern is complaining primarily about the use of *translators* in Bakersfield, California. What is notable about translators? Most translators *must* rebroadcast – or "duplicate" – the programs of the host station by FCC rule. The entire idea of a translator is to fill-in the service of the primary station, and thus broadcasters are *forbidden* from airing original content on them. And Kern's claim of the FCC falling down on the job does not even make sense, given that Section 74.1232(b) states that "[m]ore than one FM translator may be licensed to the same applicant, whether or not such translators serve substantially the same area. . . ." The Commission fails to acknowledge that Kern's comments hold no force because they refer to a service that is required to be duplicative in the first instance.

III. Conclusion

For the reason stated above, NAB respectfully requests that the Commission reconsider its grant of the Reconsideration Petition in this proceeding, and solicit comment on the effect of eliminating the FM radio duplication rule during the past four years to enable the Commission to make a facts-based decision regarding whether the radio duplication rule should be restored.

Respectfully submitted,



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