NAB
NATIONAL ASSOCIATION OF BROADCASTERS

December 7, 2018

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

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Federal Communications Commission
Office of the Secretary

Re: Notice of *Ex Parte* Communication, MB Docket Nos. 18-349, 18-227 & 17-214; GN Docket No. 18-231

Dear Ms. Dortch:

On December 4, Rick Kaplan and Jerianne Timmerman of the National Association of Broadcasters (NAB) met with Alison Steger of Chairman Pai's office; Erin McGrath and Kagen Despain of Commissioner O'Rielly's office; Evan Swarztrauber of Commissioner Carr's office; and Betsy McIntyre of Commissioner Rosenworcel's office.[1] We discussed the draft notice of proposed rulemaking initiating the 2018 quadrennial ownership review[2] and the audio and video competition sections of the draft Communications Marketplace Report.[3]

2018 Quadrennial Ownership Review NPRM

As an initial matter, NAB stated that a longer comment period (60/90 days after publication in the Federal Register for comments and replies, respectively) would be appropriate for the quadrennial ownership proceeding, given the FCC's requests for data and studies.[4]

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[1] Due to the intervening non-business day on Wednesday, December 5, NAB's *ex parte* is timely filed. NAB notes that, typically, under Section 1.1206, if an *ex parte* presentation is made on the day the Sunshine notice is released, an *ex parte* notice must be submitted by the next business day. In this circumstance, the FCC released its Sunshine notice for the December 12, 2018 meeting earlier than its common practice because the notice also explained that the FCC was delaying the start of the Sunshine period due to the National Day of Mourning for President George H.W. Bush. NAB does not believe that the early release of the Sunshine notice prohibits NAB from filing the instant *ex parte* within the FCC's traditional filing deadlines, as the filing's timing is in keeping with the spirit of the *ex parte* rules.

[2] *2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, MB Docket No. 18-349, FCC-CIRC1812-05 (Nov. 21, 2018) (Ownership NPRM or NPRM).

[3] Communications Marketplace Report, GN Docket No. 18-231, *et al.*, FCC-CIRC1812-07 (Nov. 21, 2018) (Report).

[4] *See, e.g.*, Ownership NRPM at ¶¶ 26, 50, 58.

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Local Radio Ownership Rule

In response to specific questions about NAB's proposal for reforming the local radio rule,[5] we explained why our proposal differentiated between larger radio markets (Nielsen rated markets 1-75) and smaller markets (Nielsen markets 76-268 and unrated areas). In particular, NAB discussed the much lower levels of revenue earned by smaller market radio stations and the more limited advertising revenues available in small communities and rural areas, due to their smaller populations and relatively fewer local businesses.[6] And although the draft NPRM (at ¶ 31) states that NAB did not explain why its proposal distinguished between the FM and AM services, our audio competition comments discussed the particular financial hardships and declining position of AM stations in the current audio marketplace.[7]

In addition, NAB discussed its data and evidence showing that radio stations in markets of all sizes are facing greater competition for listeners and ad dollars by online and mobile options and that the radio industry's share of the local advertising market has declined over time and is projected to decline further.[8] As a result of these pressures on stations' advertising revenues, we explained that many radio stations today – especially AM stations and those in small markets – struggle to cover their significant fixed costs, let alone generate revenues and cash flow sufficient to improve their programming, hire additional staff or upgrade their equipment.[9] Reforming the local radio rule to permit radio broadcasters to reach more listeners, increase their audiences and take greater advantage of economies of scale will improve the financial viability of local stations and their ability to serve their audiences.[10]

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[5] *See* Letter from NAB to Michelle Carey, Chief, Media Bureau, FCC (June 15, 2018); Ownership NPRM at ¶ 17.

[6] *See* Comments of NAB, MB Docket No. 18-227 at 24-25 & Attachment E (Sept. 24, 2018) (Audio Competition Comments).

[7] *See id.* at 25-26 (also noting the FCC's recognition of the daunting technical challenges facing AM stations).

[8] *See id.* at 10-23 & Attachments A-D.

[9] *See, e.g.*, Dacarba LLC, *Terrestrial Broadcast Radio Industry Continues to Show Signs of Distress* (June 4, 2018) (explaining that radio broadcasting is a "fixed cost business" because the costs required to broadcast a station's signal, including FCC licenses, specialized equipment, leases, administrative staffing, sales staffing and 24/7/365 airtime coverage "are significant and must be paid," without any "guarantee that anyone will tune in to listen"; as a result, radio broadcasters trying to improve the financial position of their businesses have little ability to cut costs).

[10] For example, radio stations with larger staffs and greater resources air more news. *See* Audio Competition Comments at 25 (citing RTDNA reports). In addition, numerous empirical studies, including those commissioned by the FCC, have shown that common ownership of radio stations has led to greater programming choices and the offering of greater numbers of different program formats to listeners. See FCC, 2007 Ownership Study No. 5, Tasneem Chipty, CRA International, Inc., *Station Ownership and Programming in Radio*, at 44-45 (June 24, 2007); NAB Comments, MB Docket No. 09-182, at 87-88 (July 12, 2010) (identifying eight additional studies finding that common ownership of radio stations results in the

In our meetings, we also noted the draft NPRM's unusual reliance on a lone blog criticizing NAB's radio ownership proposal to support the statement that "not all observers of the broadcast radio industry agree" with NAB's position.[11] If the FCC wishes to reference opinions about radio ownership expressed in the press, rather than filed with the Commission, then NAB urges the FCC to cite articles on *both* sides of the debate, including those supporting NAB's proposal.[12]

Local TV Ownership Rule

Overall, NAB observed in our meetings that the Ownership NPRM exhibited confusion as to the fundamental purpose of the local TV rule. In responding to the D.C. Circuit's decision in *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) in the 2006 quadrennial ownership review, the FCC concluded that the local TV rule is intended to promote competition for viewers and advertisers.[13] While referring to the local TV rule as "competition-based," the draft NPRM, however, emphasizes that "[l]ocalism has been a cornerstone of the Commission's broadcast regulation for decades,"[14] and asks a series of questions that appears to reframe the local TV rule as one designed to promote other goals, especially localism.[15] Indeed, the draft NPRM (at ¶ 45) specifically seeks comment on whether the local TV rule "is necessary to promote localism or viewpoint diversity," even though the Commission concluded in its 2006 review that the local TV rule "is no longer necessary to foster diversity because there are other outlets for diversity of viewpoint in local markets, and a single-service restriction is

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offering of more diverse and more targeted programming); *see also* NAB Reply Comments, MB Docket No. 18-227, at 8-9 (Oct. 9, 2018) (Audio Competition Replies).

[11] Ownership NPRM at ¶ 18 (discussing and quoting article in Radio Ink at some length).

[12] *See* Inside Radio, *Trio of Station Owners Voice Support for NAB Ownership Proposal* (June 28, 2018); Radio Ink, *NAB Board Made the Right Call on Dereg* (June 27, 2018); Radio Ink, *Another Big Push for More Deregulation* (Aug. 6, 2018) (publishing a letter signed by the CEOs and Presidents of ten radio companies supporting NAB's proposal to reform radio ownership rule).

[13] *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2064-2066 (2008) (2006 Quadrennial Order) (also stating that the local TV rule's "primary goal" is to "foster competition" and specifically finding that the rule is not needed to promote diversity). *Accord 2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864, 9887-88 (2016) (stating that the "primary goal" of the local TV rule is to "promote competition," and "not to foster viewpoint diversity"). In contrast, the FCC in the past justified retention of the national TV rule on the basis of localism, rather than diversity or competition. *See 2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13828 (2003).

[14] Ownership NPRM at ¶ 46.

[15] *See* Ownership NPRM at ¶¶ 46, 51, 59.

not necessary to foster diversity."[16] If the Commission believes it should change the rationale underlying its local TV rule, it should expressly acknowledge that it is seeking a change and should ask express questions about such a shift. NAB believes, however, that imposing a localism or diversity overlay onto a competition rule will destroy the distinctions between these concepts and lead to a muddied rationale for any decision the FCC makes in the current proceeding.

Moreover, viewing the local TV rule through a localism lens obscures the true nature of competition in today's video marketplace. Focusing on TV stations' provision of local programming, as the draft NPRM does,[17] has led the FCC in the past to downplay (or even ignore) the level of competition that broadcast TV stations face for viewers and advertisers from cable and satellite operators offering hundreds of video channels in all 210 Designated Market Areas and myriad online video providers offering an almost bewildering array of services and program choices. As NAB previously explained in comments and observed in our meetings, the local or nonlocal nature of the content on these non-broadcast platforms is irrelevant to the issue of their competitive impact on local TV stations.[18] These nonbroadcast video outlets and programming options – whether their content is local, regional, national or international – divert viewers from broadcast TV programming and local stations to other sources. And as broadcast TV stations' viewers are diverted to other video alternatives, advertisers seeking to reach audiences typically follow suit.[19]

This inconsistency and lack of clarity as to the very purpose of the local TV rule could lead to the adoption of an arbitrary rule in this proceeding. NAB therefore urges the FCC to focus its inquiry on the rule's stated purpose, competition. In addition to being consistent with previous FCC decisions, a competition centric review is consistent with Congress's directive in Section 202(h) of the 1996 Telecommunications Act – that the FCC periodically determine whether its ownership rules "are necessary in the public interest as the result of competition" and to "repeal or modify" those that are not.

In our meetings, NAB also observed that a rational FCC decision about the local TV rule – particularly any decision retaining as "necessary" restrictions on broadcast TV stations alone – cannot be based on irrelevant or misleading data. For example, paragraph three of the draft NPRM generally states that "broadcast television and radio stations remain important fixtures in local communities," and specifically notes that "television remains a common place for Americans to get their news." But the first Pew Research Center survey cited to

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[16] 2006 Quadrennial Order, 23 FCC Rcd at 2065-66 (explaining in response to the D.C. Circuit's decision in *Sinclair* that the "cross-ownership rules are designed to foster viewpoint diversity" and that the local TV rule's goal is to foster competition).

[17] *See* Ownership NPRM at ¶¶ 46, 51, 59.

[18] *See, e.g.*, Comments of NAB, MB Docket Nos. 14-50, *et al.*, at 15-16, 46-47, 64-65 (Aug. 6, 2014) (NAB 2014 Ownership Comments).

[19] *See, e.g.*, NAB Written *Ex Parte* Communication, MB Docket Nos. 14-50, 09-182, at 2-9 (June 6, 2016); NAB 2014 Ownership Comments at 34-50; NAB Comments, MB Docket No. 17-318, at 14-17 (Mar. 19, 2018).

support that proposition[20] found that the percent of U.S. adults who often get news from TV fell from 57 percent to 50 percent from 2016 to 2017; more significantly, this 50 percent of adults using TV for news includes *not just local TV news but also broadcast network TV news and cable news*. Data about viewers' usage of cable news and national broadcast network news do not support assertions about consumers' reliance on local TV stations and their news or the need for local broadcast ownership rules, as NAB has previously pointed out.[21] Indeed, in a 2002 decision pertaining to the local TV rule, the D.C. Circuit rejected the FCC's reliance on a study, which did not differentiate between broadcast and cable TV as sources of news, "much less as sources of local news," for agency findings about "the primacy of broadcast television in news."[22] And while another Pew Research Center survey cited in paragraph three of the draft NPRM found that 37 percent of U.S. adults often get news from local TV stations,[23] the draft NPRM fails to note, as Pew reported, that the 37 percent figure had fallen from 46 percent in just one year and that only 18 percent of adults ages 18-29, and 28 percent of adults ages 30-49, often get news from local TV. The Commission should add this important context prior to adopting the NPRM.

Similarly, in that same paragraph about the importance of broadcast TV in local communities, the draft NPRM cites Nielsen data about the viewing of live and time-shifted "television," which includes the viewing of broadcast, cable and satellite TV channels, to support its statement about the majority of video viewing continuing to consist of "traditional" TV.[24] Data including the time spent viewing the MVPD competitors of broadcast TV stations do not support assertions about the importance of local TV stations.[25] As NAB discussed in previous comments, moreover, Nielsen data show that broadcast TV's share of viewing (counting only broadcast, cable and DBS, and not even taking online viewing into account) has fallen over time.[26]

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20 Ownership NPRM at ¶ 3, note 15 (citing *Americans Online News Use Is Closing in on TV News Use*).

21 *See, e.g.*, Petition for Reconsideration of NAB, MB Docket Nos. 14-50, *et al.*, at 18-19 (Dec. 1, 2016) (NAB Ownership Recon Petition) (pointing out that FCC erred in relying on a study that did not differentiate between local and other news or between broadcast and non-broadcast sources of TV news in concluding that local television continued to dominate as a source of news and that the newspaper/TV cross-ownership rule should be retained).

22 *Sinclair*, 284 F.3d at 163.

23 Ownership NPRM at ¶ 3, note 15 (citing *Fewer Americans Rely on TV News; What Type They Watch Varies by Who They Are*).

24 Ownership NPRM at ¶ 3 & note 12.

25 The draft NPRM's statement that the "amount of video Americans watch has actually been on the rise," *id.* at ¶ 3, is also of questionable relevance, given that the total amount of "video" consumed includes the growing amounts of *online* video consumption.

26 *See, e.g.*, NAB Comments, MB Docket No. 17-318, at 28-29 (Mar. 19, 2018) (broadcast TV's share of prime time viewing (counting broadcast, cable and DBS) among the audience most coveted by advertisers (those ages 18-49) fell from 42 percent in 2007 to 31 percent in 2017). NAB further observes that the draft NPRM's statement about the stability of total broadcast industry revenues, comparing only 2016 and 2017, does not accurately reflect

Finally, in response to a specific question about the local TV rule's top-four prohibition, NAB reiterated that a bright line rule banning the combination of two stations ranked among the top four in every local market is not justified.[27] We noted that other communications services, such as wireless services, are not subject to such hard-and-fast prohibitions against combinations.

<u>**Communications Marketplace Report**</u>

In our meetings, NAB expressed concern about the Report's lack of balance in the audio market section and its treatment of commenters in the audio competition proceeding. The Report completely ignores the comments of the two groups of radio broadcasters that filed.[28] NAB submitted comments with data and empirical evidence showing radio stations' decreasing share of local advertising revenues; continually growing digital/online advertising and advertisers' increasing use of digital/online options rather than radio and other traditional media; declines in time spent listening to AM/FM radio stations, especially among listeners younger than 35; the rapid growth of online audio services; and consumers' use of devices other than radios to access audio content.[29] The draft Report, however, does not acknowledge this information but cites NAB's comments only for two very minor points (the fact that Sirius/XM comes standard or as an option with every major automaker and for providing examples of radio apps).[30]

In contrast, NAB observed that the draft Report relies on the comments of the musicFIRST Coalition and the Future of Music Coalition (Coalitions), advocacy organizations that are primarily concerned with Congress changing copyright law.[31] The Report (at ¶¶ 144, 148, 150, 166) cites the Coalitions' Comments four times for significant propositions concerning barriers to entry in radio broadcasting; the reasons for bankruptcies and restructurings of major radio groups; the content costs that satellite and online audio providers have but broadcast stations do not, due to differences in copyright law; and for the difficulty that radio

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the decline in broadcast industry revenues over the long term, especially in comparison to those revenues prior to the Great Recession. *See id.* at ¶ 3 & note 14. In previous proceedings, NAB provided evidence showing that TV and radio industry advertising revenues have declined in the long term, comparing years both before and after the Great Recession. *See, e.g.*, NAB Written *Ex Parte* Communication, MB Docket Nos. 14-50, 09-182, at 8-9 (June 6, 2016); NAB 2014 Ownership Comments at 65; *see also* Audio Competition Comments at 22 (noting Kagan's report that the overall U.S. advertising market had not, by 2017, equaled its pre-recession level of 2006).

[27] *See, e.g.*, NAB Ownership Recon Petition at 8-10.

[28] Five radio station groups of varying sizes filed joint comments, as did two very small radio groups. *See* Joint Comments, MB Docket No. 18-227 (Sept. 24, 2018) (Joint Comments); Comments of Local Community Broadcasters, MB Docket No. 18-227 (Sept. 24, 2018).

[29] Audio Competition Comments at 10-23 & Attachments A-D.

[30] *See* Report at ¶ 143 note 418; ¶ 164, note 501.

[31] Comments of musicFIRST Coalition and Future of Music Coalition, MB Docket No. 18-227 (Sept. 24, 2018) (Coalition Comments).

station clusters experience in selling advertising and competing against larger local clusters "in small markets."[32] Interestingly, for their broad statement about "smaller AM/FM clusters in small markets" finding it hard to compete against larger local clusters, the Coalitions' sole supporting anecdote is an inapposite statement by Jeff Smulyan of Emmis Communications about his company's stations in *New York City*.[33]

The audio section of the draft Report also leaves out some important context that should be incorporated prior to its adoption. For example, the draft Report (at ¶ 162) discusses at some length how "[d]ifferent audio marketplace participants are subject to different music licensing conditions" under copyright law, "which may affect how they compete with one another." However, there is no comparable recognition that the different treatment of radio broadcasters under the Communications Act of 1934 and FCC rules may affect the ability of radio stations to compete with other audio market participants, given the significant regulatory costs that the law places only on terrestrial radio broadcasters.[34] Elsewhere, the draft Report (at ¶ 149) identifies several transactions for higher-valued stations in large markets, but it does not recognize there is little demand and very low prices for many other radio stations.[35] The Report (at ¶ 148) further emphasizes the "dearth of new stations" and the lack of available radio frequencies, but the record shows that since the current radio ownership limits were set in 1996, over 3,300 new full-power AM and FM stations, and over 9,200 hundred radio stations of all kinds, have come on the air.[36]

In addition, the draft Report (at ¶ 161) cites data showing how broadcast radio exceeds other audio market participants in reach and listenership, but ignores data submitted by NAB showing declines in time spent listening to broadcast radio in recent years and significant increases in the number of homes without radios.[37] The Report also cites Edison "Share of Ear" data that does not seem current and which show a higher level of AM/FM

[32] Report at ¶ 144 and note 419.

[33] Joint Reply of Coalitions, MB Docket No. 18-227, at 9-10 and note 29 (Oct. 9, 2018). To the extent that the Coalitions implied in their initial or reply comments that Emmis Communications is (or should be) opposed to deregulation of radio ownership or increased common ownership of stations (*see* Coalition Comments at 8-10), we observe that Emmis has publicly supported NAB's proposals for reforming the radio ownership rules. *See* Radio Ink, *Another Big Push for More Deregulation* (Aug. 6, 2018) (publishing a letter signed by the CEOs and Presidents of ten radio companies, including Mr. Smulyan of Emmis, supporting NAB's proposal to reform radio ownership rule).

[34] *See* Audio Competition Replies at 5-6 (discussing the costs of obtaining FCC licenses; building or obtaining and then maintaining extensive infrastructure; complying with numerous FCC regulations and requirements; and, above all, providing signals for free to the public).

[35] Low-valued stations that lack a significant amount of revenue and/or cash flow are referred to as "sticks," as their value derives from their technical facilities (i.e., equipment including the tower and antenna).

[36] Audio Competition Replies at 7 & note 17.

[37] Audio Competition Comments at 21-22 and Attachment D.

listening than Edison's 2018 data, which NAB cited.[38] And an analysis of competition for advertising revenues is conspicuous by its absence, despite the information and empirical evidence submitted by NAB and other broadcasters.[39]

Finally, we noted that both the video and audio sections of the Report include questionable statements about marketplace competition. For instance, the video section (at ¶ 92) states that "commercial stations compete primarily with other commercial broadcast stations" within their DMAs "for audiences and advertising revenue." This potentially sweeping statement is not justified by the record here, which does not engage in the type of analysis needed to define the relevant local video marketplace. Moreover, the specific emphasis on "commercial" stations is unwarranted. While noncommercial TV stations do not compete for advertising revenues, they certainly compete for audiences. Indeed, the draft quadrennial NPRM states that, according to Nielsen, "there are instances where noncommercial television stations have audience shares comparable to those of commercial stations."[40] In the audio section, the draft Report (at ¶ 152) states that, as a "primarily subscription based-service, Sirius XM—unlike terrestrial broadcast radio—does not rely on advertising as its primary revenues source," thereby implying that radio stations do not really compete with satellite radio. But as NAB and other broadcasters described, SiriusXM competes with radio stations for listeners.[41] In fact, even the Coalitions recognized that "the threat from SiriusXM is a clearer and more present danger to broadcast radio" today, especially in the car.[42]

Finally, we observe that the draft Report may overstate the competitive separation between various video and audio services.[43] The Report, for example, should consider that many consumers do not readily differentiate between broadcast and non-broadcast video channels, but view them as "television," with some apparently not even realizing that certain channels – the broadcast ones – can be legally obtained for free.[44] Other consumers,

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[38] *See* Audio Competition Comments at 21 & note 77. The Report (at ¶ 161 & note 488) cited undated Share of Ear data that appears on shareofear.com, which describes and promotes the various services Edison provides. Share of Ear is a quarterly report available only through subscription, and the Share of Ear information appearing on shareofear.com appears to be a promotional example of the type of data that a subscription will obtain and is consistent with earlier Share of Ear data, rather than 2018 data.

[39] Audio Competition Comments at 16-20, 22-23, Attachments A-C; Joint Comments at 8-11.

[40] Ownership NPRM at ¶ 61.

[41] *See* Audio Competition Comments at 11; Comments of Local Community Broadcasters, MB Docket No. 18-227, at 4 (Sept. 24, 2018).

[42] Coalition Comments at 18.

[43] See Report at ¶ 114 (stating that "there are significant differences" between TV broadcasters, MVPDs and OVDs in the products they offer, the geographic availability of their services and how consumers view their products); *id.* at ¶ 161 (making similar statement about radio broadcasters, satellite radio and online audio providers).

[44] *See, e.g.*, Brian Shim, *Save Thousands of Dollars While Watching the TV Shows You Love*, disablemycable.com (Sept. 26, 2018) (assuring readers that obtaining digital broadcast TV channels for free "is completely legal").

moreover, mix and match video options, combining, for example, over-the-air TV broadcast TV with OVD service(s), which together function as a substitute for MVPD service.[45] Rather than viewing video (and audio) market participants as existing in separate competitive silos, all these competing providers are available as one large smorgasbord from which consumers may select. NAB believes the Communications Marketplace Report and the Ownership NPRM should more clearly reflect this competitive reality.

Respectfully submitted,

Rick Kaplan
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Legal and Regulatory Affairs

cc: Alison Steger
Erin McGrath
Kagen Despain
Evan Swarztrauber
Betsy McIntyre

[45] *See, e.g.,* NAB Comments, MB Docket No. 17–214, at 3-7 (Oct. 10, 2017) (explaining that TV broadcasters, MVPDs and OVDs offer competing alternative to consumers and observing that declines in MVPD subscribership has been accompanied by growing consumer use of over-the-air broadcast and OTT services).