NFIB
The Voice of Small Business.
1201 F Street NW, Suite 200
Washington, DC 20004

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of:	)	
National Television Multiple Ownership Rule	)	MB Docket No. 17-318

February 2, 2018

TO: Secretary of the Commission
Office of the Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

RE: Comments on Notice of Proposed Rulemaking titled "National Television Multiple Ownership Rule," MB Docket No. 17-318, FCC 17-169, 83 *Fed. Reg.* 3661 (January 26, 2018)

1. The National Federation of Independent Business (NFIB) files these comments in response to the Federal Communications Commission (FCC or Commission) notice of proposed rulemaking (NPRM) on "National Television Multiple Ownership Rule," published in the *Federal Register* of January 26, 2018. For reader convenience, NFIB recommendations are set forth below in bold typeface.

2. NFIB is an incorporated nonprofit association with approximately 300,000 members across the country. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. NFIB advances the interests of small and independent businesses. The NPRM notes (83 *Fed. Reg.* at 3666-3667) that the National Television Multiple Ownership Rule and its potential revocation affect many small businesses.

3. The NPRM sought comments on "whether Congress's instruction to the Commission to 'modify its rules' in 1996 and 2004, rather than simply mandating a specific national audience reach cap, preserves the Commission's traditional statutory authority to alter or eliminate the cap in a future rulemaking." 83 *Fed. Reg.* at 3662. When the FCC is uncertain about the meaning of a statute that the FCC implements, it should not seek legal advice about its meaning from the relatively small number of members of the public who choose to comment on an NPRM; instead, the FCC should seek a legal opinion from the qualified attorneys ultimately accountable to the one officer of the United States whom the Constitution directs to "take Care that the Laws be faithfully executed" (that is, the President of the United States). For the FCC, those qualified attorneys are the FCC general counsel (47 CFR 0.41(c)) and the Attorney General of the United States or the Attorney General's designee (the Assistant Attorney General, Office of Legal Counsel, 28 CFR 0.25). Thus, **NFIB recommends that the FCC seek a formal legal opinion from the FCC General Counsel, or the Attorney General, concerning whether the FCC has the legal authority to alter or eliminate the national audience reach cap.**

4. The FCC's request for a legal opinion should cite subsections 202(c) and (h) of The Telecommunications Act of 1996 (Public Law 104-104, February 8, 1996), as amended by section 629 of the Consolidated Appropriations Act, 2004 (Public Law 108-199, January 23, 2004) (47 U.S.C. 303 note). Subsection 202(c) provides in pertinent part:

> *. . . The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)-- . . . (B) by increasing the national audience reach limitation for television stations to 39 percent.*

Subsection 202(h) provides that:

> *. . . The Commission shall review . . . all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.*
>
> *This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).*

The Commission modified section 73.3555 as directed by subsection 202(c), and section 73.3555 currently reads:

> *. . . No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.*

5. Section 202(h) appears on its face to make clear that the FCC lacks authority to change the 39 percent limitation. Section 202(h) directed the FCC to review quadrennially all FCC ownership rules and to repeal or modify any regulation it determines to be no longer in the public interest, but then, with the last sentence of subsection 202(h) specifically excluded from the review-and-repeal-or-modify provisions the 39% national audience reach limitation. **It would seem, from the Congress's decision to exclude the 39% limitation from the quadrennial review and from the specific grant of authority to repeal or make modifications, that Congress made permanent the 39% limitation and that only a new law passed by Congress can repeal or modify the limitation. If that ultimately is the legal opinion of the FCC general counsel and the Attorney General, then the FCC should (consistent with OMB Circular A-19 revised) submit to Congress proposed legislation to repeal the 39% limitation or to grant the FCC authority to revoke it.**

6. The NPRM also sought comment on "whether there is still a need for a national cap that prevents ownership of stations that collectively reach more than a certain percentage of the television households across the country" (83 *Fed. Reg.* at 3663 col. 1). There is no need for the national cap. *First*, to the extent the law allows, the FCC should support free market competition, which is the essence of the American economic system (15 U.S.C. 631(a)) and generally encourages innovation, efficiency, and satisfaction of demand at the best prices, including in communications services and the buying and selling of communications outlets such as television stations. *Secondly*, to the extent a purpose of the cap was to prevent a situation in which the American people hear from only one or a few public policy voices, modern technology has furnished a multiplicity of means by which to communicate to the American people and by which they can communicate among themselves on a broad scale. *Thirdly*, when the FCC decides by a regulation issued under law to limit the ability of a person to acquire a means of communication, it comes dangerously close to "abridging the freedom of speech" protected by the First Amendment. *Fourthly*, to the extent that any residual concern remains about the size and reach of a communications enterprise, the Federal antitrust laws (see list at 15 U.S.C. 12(a)) remain in force and the Federal agencies (Department of Justice and Federal Trade Commission) with responsibility for enforcing them remain vigilant.

7. **The FCC should revoke the national audience reach cap if it has the authority to do so or, if it lacks that authority, the FCC should, as discussed above, ask Congress to repeal it or to grant the FCC the authority to revoke it.** NFIB appreciates the authority to comment in response to the proposed rule with the aim of protecting the rights and interests of small businesses in the communications industry.

David L. Addington — February 2, 2018

David S. Addington
Senior Vice President and General Counsel
National Federation for Independent Business, Inc.

Date